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# Speech

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## **MERGERS, EFFICIENCY AND THE COMPETITION ACT\***

### **NOTES FOR AN ADDRESS**

BY

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## INTRODUCTION

It is now more than two years since the Competition Act<sup>1</sup> came into effect. As may be expected, numerous analytical issues have arisen with respect to the application of the new provisions, particularly regarding mergers and acquisitions. Therefore, in my remarks today, I intend to first discuss some aspects of the framework within which we are reviewing merger transactions. Then I will focus on the application of section 96 (formerly s.68), the efficiency exception to mergers, which is of considerable importance in the administration and enforcement of this legislation. It is one of the sections which many Canadian businesses and their counsel are focussing upon as they examine the benefits of restructuring in the face of increasing global competition. Consequently, I would like to discuss some of the pertinent issues which arise upon consideration of the efficiency exception.

## OBJECTIVES OF COMPETITION POLICY

The Competition Act was enacted after extensive debate and consultation which spanned nearly two decades. The drafters of the new legislation could draw on the wealth of

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<sup>1</sup> Competition Act R.S., c. C-34, s. 1; C. 19 (2nd Supp) s. 19.



knowledge and experience in the United States and Europe.

In addition, the inherent structural characteristics of the Canadian economy had an important influence on the design of competition policy. In Canada, small and geographically segmented markets often lead to high levels of market concentration. However, Canadian companies, while tending to be large relative to the domestic market, may in some industries still be too small to achieve efficient scale of production and may find it difficult to compete effectively with foreign firms at home and abroad. Firms may therefore pursue mergers to realize production and other efficiencies already experienced by their larger foreign rivals. At the same time, firms in other Canadian industries are comparatively insulated from foreign competition due to tariffs and non-tariff barriers to trade. A merger in these markets could lead to anticompetitive effects which may outweigh any efficiencies that may arise. Each case, of course, has to be evaluated on its own merits.

The purpose of the Competition Act is to maintain and encourage competition in Canada in order to promote a diverse set of objectives. By safeguarding the competitive process itself, our competition policy recognizes, and places in high regard, economic efficiency and the adaptability of the Canadian economy as well as the provision to consumers of competitive prices and product choices.

Fostering competitive markets promotes the interests of consumers and businesses alike. This is set out in the purpose clause of the Act contained in section 1.1 which states:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

The role of competition law is to promote the operation of open and free markets. Competition law should intervene only when required and only to the extent necessary to protect competition. The Act is designed to facilitate and not impede legitimate restructuring of firms in order to achieve economic efficiency.

#### **THE MERGER PROVISIONS**

The most important and far-reaching reform brought about by the passage of the new competition legislation is in the area of mergers. While the merger provisions under the previous Combines Investigation Act were enacted in 1910, over the subsequent period of 76 years, the Government brought just nine cases to the courts in order to prevent acquisitions considered to be detrimental to the public



interest. Of these, not one contested merger case was successfully prosecuted. This was largely because the merger provisions were part of the criminal law and judicial interpretation required the strict standard of proof of "beyond a reasonable doubt" to be met. This was an exceedingly difficult burden to meet in the context of the legislation's "public detriment" test.

The fundamental change in the merger law under the new Act is that it has been decriminalized and moved to an administrative law environment. The new provisions adopt the less onerous non-criminal standard of "a balance of probabilities" which is better suited to the examination of complex economic matters such as mergers. Under this standard, a wide variety of factors and their effects can be examined in gauging the competitive impact of a particular acquisition.

The new merger law adopts a test under section 92 (formerly s.64) of substantial prevention or lessening of competition which is assessed both quantitatively and qualitatively by recognizing a broad and non-exhaustive range of factors that are specified under section 93 (formerly s.65). These factors include the extent of foreign competition, whether the proposed merger involves a failing firm, the availability of acceptable substitutes, barriers to entry, the effective competition remaining after the merger, the likelihood the merger removes an effective and vigorous competitor, and the extent of change and innovation in the



market. In determining whether or not the merger substantially prevents or lessens competition, an adjudicative body known as the Competition Tribunal is directed by the Act to consider these and other factors. Under subsection 92(2), a finding that a merger substantially prevents or lessens competition is not permitted solely on the basis of evidence of market share or concentration. This provision is designed to ensure that the assessment is more than a mechanical process and that consideration is given to the dynamic aspects of competition.

I have discussed the features of the Competition Act as they relate to mergers in greater detail on a number of occasions over the past two years. For those who may not be familiar with the Act generally or the merger provisions in particular, copies of speeches and other materials, such as Information Bulletins, can be obtained by contacting the Bureau of Competition Policy.

The efficiency exception contained in section 96 of the Act recognizes that mergers, otherwise proscribed under the substantive provisions of section 92, may be permitted to proceed where they are necessary for the realization of economic efficiencies which are greater than and offset the anticompetitive effects of the merger. Only the Director can make an application to the Competition Tribunal for an order to prohibit, dissolve or alter a particular merger transaction. Since an application by the Director can, in

and of itself, cause some proposed mergers to be abandoned, such decisions have to be made with care and on a properly informed basis. In making those decisions, the Director will also consider the efficiency exception before referring a particular merger to the Tribunal.

Since the passage of the new Act, my Office has been actively involved in reviewing numerous mergers and acquisitions. In fact, the merger wave has been of considerable magnitude since 1986. During the period from June 1986 to the end of September 1988, there were over 2,300 mergers and acquisitions in Canada reported in the financial press and trade journals. The vast majority of these transactions have not raised any significant competition concerns and many have had a beneficial impact on the economy. However, a small proportion of these mergers have raised the possibility of having an adverse effect on competition and economic performance and therefore have warranted varying degrees of examination. To date (October 15, 1988), the Bureau has completed examination of 253 proposed merger transactions. Only those cases that required more than two days of examination are included in this figure. Of these, seven have been restructured, three before closing and four with post closing undertakings, and five have been abandoned for reasons in whole or in part related to the position I have taken. Two mergers are currently before the Tribunal and in two other matters applications were made to the

Tribunal. The remainder of those examined have been allowed to proceed as proposed although some are subject to a specific monitoring program.

These statistics while reflecting the broad range of case resolution methods available under the Act, also indicate that we are enabling the great majority of transactions to proceed as originally proposed. In a number of these cases the merging parties have submitted information on efficiencies in support of the proposed transaction; however, we did not find the information acceptable in some cases. Although there has been no case as yet in which the efficiencies claimed have been sufficient in and of themselves to outweigh a substantial lessening of competition arising from the merger, there have been several cases wherein the efficiency gains accepted by the Director have been considerable.

As the Tribunal has not yet made a decision interpreting various aspects of the efficiency exception, I believe it is important to discuss the approach we in the Bureau are currently taking with regard to this section of the Act. I should add parenthetically that we will soon be issuing an Information Bulletin addressing this particular subject in more detail.



**THE RATIONALE AND NATURE OF THE MERGER EFFICIENCY EXCEPTION  
s.96 (FORMERLY s.68)**

The efficiency exception in section 96 of the Act is a new feature of Canadian merger law enforcement which has been specifically designed to meet the unique needs and characteristics of the Canadian economy I described earlier. The section explicitly recognizes that some mergers, even if they may lessen competition substantially, may still be beneficial to the economy. In certain cases, such mergers may give rise to efficiencies which on balance can augment our economic well being by improving the performance of the Canadian economy. Parliament recognized that the Act should permit and not prevent these types of mergers from taking place.

It is my understanding that Canada is the only major industrialized country which has enacted such a provision in its competition legislation. Indeed, the Canadian Competition Act is being studied as a model by several OECD countries, not only for its efficiency exception but also because of its mixture of qualitative and quantitative considerations which allow for a more realistic and balanced approach towards merger assessment.

The precise wording of section 96 of the Act is as follows:

96(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

- (a) a significant increase in the real value of exports; or
- (b) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Until the Tribunal has had the opportunity to consider this section, the question arises as to how this important and complicated section is to be properly interpreted and applied so as to reflect Parliament's intention?

The term "merger" is defined broadly in section 91 (formerly s.63) of the Act to include the direct or indirect acquisition of control over the whole or part of a business of a competitor, supplier, customer or other person. In assessing a particular merger transaction, the Director may focus his examination on all or selected fields of business operations in which the merging entities are engaged in,

with the view towards determining those activities where there is a likelihood of substantial prevention or lessening of competition.

Accordingly, the assessment of efficiency gains under section 96, subject to various qualifications mentioned below, would in most cases be related to the product market where the merger is likely to result in a substantial prevention or lessening of competition. In a situation where the merging parties each produce one type of product and operate in the same geographic market, there will be an immediate correspondence between the efficiency gains claimed and the relevant market where the substantial prevention or lessening of competition is likely to arise from the merger.

However, the real world is not always composed of single product single market firms. As is often the case, a particular merger transaction may entail multiple and distinct product and geographic markets. Our experience indicates that most mergers do not simultaneously give rise to a substantial prevention or lessening of competition in several different markets. Indeed, the gains in efficiency which may arise from the transaction may be completely unrelated to the market for which an order under section 92 may be sought from the Tribunal. This obviously has a bearing on the application of s.96 to the case at hand.



The application of s.96 is very much determined by the type of order which the Director may seek from the Competition Tribunal pursuant to s.92 of the Act. If the merger transaction which the Director puts before the Tribunal encompasses more than one market, the gains in all these markets potentially could be considered, subject to the order sought under the section 92. The order sought should be directed to the market or markets where a substantial prevention or lessening of competition is or is likely to result from the merger. The gains in efficiency that would enter the balancing process under subsection 96(1) are those that would not likely be attained if the order blocking the merger were made. Thus, in the usual case, the gains in other markets concerned which will not be affected by the order, will not be considered. On the other hand, a question arises as to whether gains in efficiency related to other markets ought to be considered when they will not likely arise due to the order. Thus, there may be exceptions where the gains in efficiency relating to different markets within the merger transaction cannot be separated in any practical sense from each other and therefore would also likely be blocked by the making of a partial divestiture order.

Suffice it to say at this stage that, in evaluating efficiency gains, we will continue to have regard to the commercial realities of the marketplace and different types of situations falling under the Act will need to be considered on a case by case basis. In this regard, the merging parties should be prepared to provide objectively documented information on the efficiencies arising from the merger. They should also be prepared to establish, where applicable, that the various efficiencies are not separable and are integral to the transaction, that they will not likely be achieved through means other than a merger and that, as such, they will not likely take place if the transaction in whole or in part is prevented.

#### **DEFINITION OF GAINS IN EFFICIENCY**

Before any balancing of gains in efficiency and the effects of any substantial prevention or lessening of competition can be accomplished, the acceptability of proposed efficiencies must be ascertained. The term "gains in efficiency" is not defined in the Act. The phrase "gains in efficiency" is found in only two sections of the Act, section 86, which deals with specialization agreements, and section 96, the merger efficiency exception. An approach that I have adopted initially is to generally accept a gain in efficiency as the dollar value reduction in per unit

costs of production or distribution. This approach has the obvious advantage of defining efficiency gains in a simple way -- that is, any diminutions in unit costs which are likely to result from the merger are generally acceptable. However, consideration of efficiency gains should also entail evaluating qualitative factors in addition to quantitative measures relating to the magnitude of cost reductions. Thus, improvements in product quality or improved service which are not easily measurable or quantifiable may also be considered as efficiencies if they are reasonably ascertainable and can be demonstrated to arise from the merger. In summary, efficiency gains should represent real savings in resources which will permit the firm to produce more output or better quality of output from the same amount of input.

The approach to efficiency should include the concepts of production efficiency and dynamic efficiency. Although these types of efficiencies, where possible, will be quantitatively and qualitatively considered when determining the gains in efficiency arising from the merger, production efficiencies are likely to be more easily documented. Merging parties and their counsel might, therefore, be well advised to initially concentrate their efforts on establishing such efficiencies. Examples of these production efficiencies typically associated with lower per unit costs include, but are not limited to, the following:



- (i) Economies of scale: when the unit cost of production decreases as the scale of output increases;
- (ii) Economies of scope: when it is more efficient to produce two or more products together than it is to produce them separately;
- (iii) Transaction cost economies: when there are savings associated with production within the firm as opposed to external purchases.

In practice, these translate into situations where parties expect to realize gains in efficiencies that might include better integration of production facilities, production line economies, distribution economies, accounting economies, specialization of inputs made possible by large scale production, the increased ability to incur risks by a size-induced diversification, advertising and finance efficiencies, or the ability to spread the costs associated with research and development.

Dynamic efficiencies recognize that improvements in product quality, introduction of new products and innovations, and increased product choice and service, may embody elements of social and economic benefit arising from the merger. As indicated, not only quantitative estimates of cost reductions, but also gains in efficiency which are qualitative in nature should be considered. It is

recognized that qualitative gains are generally difficult to measure but, where they can be verified or accepted as likely, they should be considered.

The parameters for assessing "gains in efficiency" are also subject to various economic and accounting qualifications. The main qualifications can be summarized as follows:

1. The expected dollar value of the efficiency gain should be accurate and reasonably ascertainable having regard to current generally accepted management and accounting principles.
2. Generally, the cost savings should be savings in the cost of production rather than a cost associated with the acquisition. For example, the acquiring firm may purchase several plants, with every intention of selling off one of the acquired plants to finance the merger. The sale price of the capital asset per se will not be treated as a legitimate efficiency gain.
3. The proposed gain in efficiency should be net of any costs incurred to obtain such gain; for example, retooling, legal fees, financing charges and winding-up expenditures.
4. Finally, the gains in efficiency must be brought about or likely to be brought about by the merger or proposed merger; they should not be of a type that would be

realized in any event or would likely be attainable if the merger were blocked. The first consideration is whether these efficiency gains would likely be attained if the firms continued to compete. Alternatively, some efficiencies may be practically and reasonably attained through means less restrictive of competition such as specialization agreements, joint ventures, contracting or licensing arrangements or a likely and less restrictive merger with another party.

The responsibility for establishing the likely attainment of an efficiency gain will rest with the parties relying on section 96. Further, subsection 96(3) codifies the principle that all cost savings for the merging firms do not necessarily represent legitimate gains in efficiency. Some cost savings may reflect a redistribution of income rather than a savings in real resources used in the productive process. Accordingly, gains in efficiency that are pecuniary in nature, that is arising as a result of a distribution of income between two or more persons, are unacceptable.

By way of illustration, cost savings that result when a firm is able to use increased bargaining leverage to extract volume discounts from suppliers are not eligible per se for consideration. The fact that the purchaser is able to obtain products at a reduced cost in these circumstances is only a transfer of income from suppliers. However, cost



savings resulting from larger volume orders, which enable the purchaser to attain economies of scale or incur lower transaction costs, may reflect real efficiency gains and consequently may be accepted for consideration. If the placement of larger volume orders also enables the supplier to reduce costs, part of which are transferred to the purchaser in the form of lower prices, then that part may also qualify as real efficiency gains. Other examples where such pecuniary gains in efficiency may arise, and are thus not allowable, might be found in labour procurement situations and tax savings matters.

#### **OTHER s.96 CONSIDERATIONS**

Attention should also be directed to the phrase, "... gains in efficiency that will be greater than, and will offset the effects of any prevention or lessening of competition ...", contained in subsection 96(1). As indicated, evaluation of the anticompetitive effects and the efficiency gains that may arise from a merger entails consideration of both quantitative and qualitative factors. The above phrase suggests that not only are both the quantitative and qualitative factors weighed in the balancing process, but that the relevant efficiency gains should be of a significant magnitude to adequately compensate for the loss of competition to which the merger would give rise to.

Efficiency claims will generally be considered even if they could be achieved by another merger involving other parties. That is, in evaluating efficiency gains, the efficiency gains in our view need not be unique to the merging parties. The term "unique" in this context means efficiencies which only the specific transacting parties can attain but which cannot be attained if the acquisition were to be made by another firm. However, in certain circumstances the efficiency claims of a proposed merger may be disallowed if an alternative less restrictive merger is likely which has been proposed or seriously contemplated by one of the parties and which will likely give rise to similar efficiency gains. In a similar manner, the efficiency gains that can be reasonably attained through alternative, less anticompetitive means, such as specialization agreements, contractual arrangements, licensing or joint ventures, will not be considered in the balancing process, as they could still be achieved in some circumstances involving the same two parties even if the order blocking the merger were made. To conclude that the efficiency gains could be achieved through alternative means will require a judgment that their attainment is more than a theoretical possibility; in other words, that the alternative means are commercially practical or reasonable. It will not be sufficient for the parties to indicate that they

are not prepared to enter into a less restrictive arrangement, when, for example, these arrangements are already prevalent in the industry.

Finally, subsection 96(2) provides that, in considering whether a merger or proposed merger is likely to bring about gains in efficiency, the extent to which the efficiency gains in question will result in (a) a significant increase in the real value of exports, or (b) a significant substitution of domestic products for imported products, shall be taken into consideration. It should be pointed out that increased exports and reduced imports arising from the merger are not in and of themselves equivalent to efficiency gains within the meaning of subsection 96(1). In several cases, there have been attempts to include the dollar value of the exports themselves in the claims relating to gains in efficiency. In the Director's view, the purpose of this provision is to indicate that where efficiency gains allow a firm to significantly increase the real value of exports or significantly substitute domestic products for imported products, this export/import information should be given additional weight in favour of the merging parties in the balancing process under subsection 96(1).



## CONCLUDING REMARKS

In conclusion, it should be apparent from this brief overview that we have tried to develop a realistic and practical approach to the efficiency exception contained in section 96 of the Competition Act. In this regard, we are striving to ensure that our approach reflects the true meaning and intent of the statutory language. We will, however, continue to refine and clarify our approach towards the implementation of various provisions of the Competition Act, including section 96. I look forward to any comments or views you may wish to convey to me on my remarks today.

Thank you.



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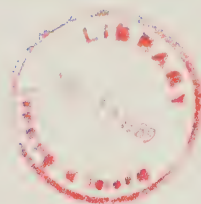
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**PRODUCT DISTRIBUTION AND THE COMPETITION ACT:  
THE TREATMENT OF REVIEWABLE MATTERS  
AND PRICE MAINTENANCE**

NOTES FOR AN ADDRESS

TO THE

DISTRIBUTION LAW SEMINAR

B.C. CONTINUING LEGAL EDUCATION SOCIETY

VANCOUVER, B.C.

BY

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CONSUMER AND CORPORATE AFFAIRS CANADA

VANCOUVER, OCTOBER 18, 1988





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## I     INTRODUCTION

Distribution is a vital aspect of providing goods and services to consumers, which has a major impact on the performance of the economy as a whole. Distribution arrangements such as franchise systems involve extensive co-operation among firms at various levels of the market, frequently entailing restrictions on the conduct of individual distributors or suppliers. Depending on the facts in each case, such arrangements may raise issues under the Competition Act. An awareness of the provisions of the Act and related jurisprudence can help business persons (and legal counsel) avoid coming into conflict with the law.

From the standpoint of product distribution arrangements and franchise systems, the provisions of the Competition Act that deal with reviewable matters and price maintenance are among the most important provisions. Reviewable matters provisions relevant to product distribution include: (i) provisions concerning refusal to deal; (ii) consignment selling; (iii) exclusive dealing; (iv) tied selling and territorial market restriction; and (v) abuse of dominant position.<sup>1</sup>

These provisions embody a case-by-case approach that balances the pro- and anticompetitive effects of business practices in the marketplace.



The price maintenance provisions prohibit attempts to influence prices upward, or to discourage their reduction. These provisions are applicable whether such attempts take the form of agreements, threats, promises or other like means. The provisions also establish related offences regarding refusal to supply a product to persons having a low pricing policy, and attempts to induce such refusals to supply.

The reviewable matters and price maintenance provisions are generally applicable to most forms of product distribution arrangements. However, the provisions incorporate explicit exceptions for arrangements between affiliated companies, partnerships and sole proprietorships. In addition, the price maintenance provisions contain an exception for situations where the person attempting to influence the conduct of another person and that other person are principal and agent respectively. The provisions governing exclusive dealing, tied selling and market restriction also set out exceptions for certain classes of distribution systems involving the use of a trade mark. These provisions and exceptions facilitate the operation of some types of franchise systems.

This paper examines the statutory provisions and jurisprudence which interpret the reviewable matters and price maintenance sections of the Competition Act. Where appropriate, it refers to U.S. as well as Canadian cases

to provide perspective on the various sections. The paper also addresses the economic underpinnings of the statutory provisions in the area of price maintenance, providing a background for discussing current policy issues in this area.

This paper does not deal with the merger provisions of the Act and the treatment of buying groups, which are aspects of competition law that may be important from the standpoint of product distribution. These subjects have been dealt with recently in several speeches by the Director of Investigation and Research and his staff<sup>2</sup>, which are available on request from the Director's office.<sup>3</sup>

Before coming to the substantive sections of this paper, it may be helpful to comment briefly on the recent modernization of Canadian competition legislation, the roles and responsibilities of the various bodies involved in the administration of the Competition Act, and the current approach of the Director of Investigation and Research in ensuring compliance with the Act.

In 1986, Parliament enacted major reforms to Canada's existing competition legislation in the Combines Investigation Act.<sup>4</sup> This Act replaced the previous, ineffective, criminal merger and monopoly provisions with sophisticated non-criminal provisions that govern mergers and abuse of dominant position. These provisions incorporate new administrative provisions and enforcement powers consistent with the Charter of Rights and Freedoms.

The amendments also establish new provisions to deal with specialization agreements and delivered pricing. The 1986 revisions carry over the basic criminal provisions regarding conspiracies, price discrimination and price maintenance from the previous legislation, with minor amendments, as well as the non-criminal provisions respecting refusal to deal, consignment selling, exclusive dealing, tied selling and market restriction.

The Director of Investigation and Research is responsible for the administration and enforcement of the Act. In carrying out this responsibility, the Director is supported by staff in the Bureau of Competition Policy within Consumer and Corporate Affairs Canada. The reviewable matters provisions of the Act are dealt with by the Director applying to the Competition Tribunal, which is a specialized adjudicatory body established under the Competition Tribunal Act. The Tribunal is chaired by a judge, and is composed of lay members drawn from the academic and business communities as well as other judicial members. It replaces the Restrictive Trade Practices Commission (RTPC) established under the Combines Investigation Act. Upon referral to the Director, matters relating to the criminal provisions of the Competition Act may be prosecuted by the Attorney General of Canada in the Federal Court of Canada or in provincial courts of competent jurisdiction.

Now that this more effective legislation is in place, the Director has focussed attention on enforcing the Act. Effective enforcement involves not only vigorous application of the Act, but also public awareness of the law, combined with a flexible approach to resolving competition problems quickly and efficiently.

To increase public awareness, the Director is developing information to complement the Bureau's existing information materials such as the Misleading Advertising Bulletin and the Director's Annual Report. The Bureau of Competition Policy is preparing a series of Information Bulletins which outline the Director's views on the application and interpretation of the legislation. The Director is also making greater use of information kits and press releases.

In order to help business persons avoid conflict with the law, the Bureau of Competition Policy encourages them to make use of the Director's Program of Advisory Opinions. Under this program, business persons can submit a proposed course of action, plan or practice to the Director, who will give an opinion whether there are grounds for an inquiry. For example, a franchisor could submit a proposed franchise agreement, together with the relevant market facts, to obtain the Director's opinion whether the agreement complies with the Competition Act.

It should be emphasized that an opinion under the Program of Advisory Opinions is not binding on the Director



or the parties, who are free to test their conduct before the Competition Tribunal or the courts. However, the Bureau has found that an opinion frequently clarifies the Director's concerns, and affords an opportunity to discuss ways of resolving them. It should also be noted that while opinions can be provided on a "no-names" basis, the reliability of any opinion depends upon the extent and accuracy of the information provided.

When an issue is raised under the Act, the Director can resolve the situation in several ways other than by proceedings before the Tribunal or the courts. In relatively minor matters, a member of the Director's staff may simply contact the company involved to discuss the law and its application. This technique has been used successfully in the past to resolve matters such as refusals to deal.

With respect to mergers, the Bureau has successfully resolved cases by working out settlements with the parties involved. By discussing the issues early in the proceedings, the Director and the parties to the merger have been made to negotiate arrangements, in some cases involving undertakings that alleviate the Director's initial concerns. This consultative process is less expensive and time-consuming than protracted litigation, and is equally effective.

The Act also provides for the issuance of Advance Ruling Certificates (ARCs) in merger cases. If the trans-

action for which an ARC is issued is substantially completed within a year, the Director is barred from applying to the Tribunal on the basis of the information upon which the certificate was based. Issuing an ARC is a discretionary decision which requires a thorough analysis of the impact of the merger in the relevant market(s) and the co-operation of the parties in providing relevant information.

In relation to all of the reviewable matters under the Act, a new provision allows an application for a consent order to be made to the Competition Tribunal. The Tribunal may consider granting a consent order on terms worked out by the parties and the Director without litigation. The Bureau believes that the consent order mechanism can be a useful and effective means of resolving competition concerns. This type of resolution may also be utilized in criminal matters through subsection 30(2), Orders of Prohibition. Such orders are usually obtained with the consent of the parties, and do not involve admission of guilt.

The initial response from the business and legal communities to this compliance-oriented approach has been favourable. However, in order to obtain input on this issue and others that may arise in the future, the Bureau has established an advisory group called the Director's Consultative Forum. The Forum comprises lawyers, business people, consumer representatives and academics, who meet periodically to provide input to the Director on matters

relating to the implementation of the legislation. Among other matters, the Forum has discussed the Director's experience with the compliance measures. These discussions have been extremely valuable to the Bureau, and have generally confirmed that the compliance approach is a positive development in the enforcement of competition law.

The remaining parts of this paper are structured as follows. Part II reviews the various Competition Act provisions and related jurisprudence concerning reviewable matters. Part III examines in depth the price maintenance provisions of the Act. This part of the paper also discussed relevant economic developments and U.S. jurisprudence. The application of the Act to product distribution and franchise systems is discussed in each part of the paper. Part IV provides concluding remarks.

## II REVIEWABLE MATTERS AND PRODUCT DISTRIBUTION

The Competition Act contains a number of reviewable matters provisions that are of direct relevance to product distribution systems. These include the provisions relating to: (i) refusal to deal; (ii) consignment selling; (iii) exclusive dealing; (iv) tied selling and territorial market restriction; and (v) abuse of dominant position.

These provisions are potentially applicable to several practices which are common in the product distribution field, such as requirements to deal only in products

supplied by a particular manufacturer, restrictions on sales outside of a designated territory, decisions not to grant a franchise to a particular applicant or land banking. In each case, application of these provisions is limited to situations that meet specific statutory tests that serve to identify conduct likely to be materially harmful to competition. The following subsections examine each of these provisions.

**(A) REFUSAL TO DEAL**

The practice of refusal to deal is governed by section 47 of the Competition Act. Four criteria must be established by the Director for the Competition Tribunal to make a remedial order under this provision. These criteria are:

- a) a person is substantially affected in his/her business or is precluded from carrying on business due to his/her inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- b) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- c) the person is willing and able to meet the usual trade terms; and
- d) the product is in ample supply.



Subsection 47(3) defines "trade terms" as terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Where these criteria are met, the Tribunal may order the respondent supplier(s) to accept the person as a customer on the usual trade terms, within a specified period of time. A statutory exception arises when customs duties are removed, reduced or remitted within a specified period, placing the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada. In these circumstances, the basis of the complaint is considered to have been removed.

Subsection 47(2) establishes an important distinction affecting the application of section 47 to franchise systems. For the purposes of the section, it states that an article is not considered a separate product solely on the basis of differentiating from other articles in its class by a trade mark, proprietary name or the like. In order to be treated as a separate product, an article differentiated in this way must occupy such a dominant position in the market as to substantially affect the ability of a person to carry on business in that class of articles, unless he/she has access to the article so differentiated.

Three applications have been made by the Director to the Restrictive Trade Practices Commission (RTPC) under the refusal to deal provisions.<sup>5</sup> In each case, the applications

were ultimately withdrawn on the basis that the complainants were subsequently given access to an adequate supply of the product in question. Access has also been an important factor in discontinuing inquiries under the refusal to deal provisions prior to the Director making application to the RTPC for a remedial order. Inquiries have also been discontinued because the Director was of the opinion that the complainant was not "substantially affected" by the refusal to supply.

Probably the best known of the cases submitted to the RTPC under section 47 was the Motion Pictures (or Cineplex) case. On December 22, 1982, the Director applied to the Restrictive Trade Practices Commission for an order requiring seven major Canadian motion picture distributors to supply Cineplex Corporation, a theatre chain, with "commercially valuable" motion pictures on usual trade terms.<sup>6</sup> In June 1983, the Director obtained a number of undertakings from the distributors which altered their practices and appeared to ensure greater competition in the distribution and exhibition of motion pictures in Canada.<sup>7</sup> As a result, the Director applied for and was granted a one-year adjournment of the hearing of his application before the RTPC. The Director's staff monitored compliance with the undertakings and analyzed their effects on the marketplace. In a report to the Commission in July 1984, the Director noted that exhibitors had experienced improved

access to commercially valuable films. As a result, the Director was able to withdraw his application to the RTPC for a remedial order.

The Competition Act contains separate provisions to deal with refusal to supply when it results from a person exercising buying power outside Canada. Under section 56 of the Act, the Tribunal may make an order in this situation when it finds: (i) that a supplier outside Canada refuses to supply a product, or otherwise discriminates in the supply of a product to a person in Canada; and (ii) that the refusal or discrimination results from the exertion of buying power outside of Canada by another person. If these requirements are met, the Tribunal may order any person in Canada by whom or on whose behalf or for whose benefit the buying power was exerted to sell to the person who was refused supply or discriminated against at its laid-down cost on the same terms and conditions as it obtained from the foreign supplier. Alternatively, the Tribunal may order the second party to cease dealing in the product in Canada.

Unlike section 47 refusals, section 56 contains no provision limiting the application of the section to branded items. In addition to refusals to supply, other discriminatory acts are covered, including: activities involving price, credit and delivery terms and access to promotional material and allowances.

One inquiry involving a foreign refusal to supply has been initiated, involving a glass-cutting tool manufactured in the United States. The matter was discontinued since there was insufficient evidence that pressure was exerted on the U.S. manufacturer by the U.S. parent of the Canadian company against whom the complaint was made.<sup>8</sup>

**(B) CONSIGNMENT SELLING**

The Competition Act gives the Tribunal authority to make remedial orders respecting consignment selling. Section 48 of the Act allows the Tribunal to make such an order when it finds that the practice has been introduced either (i) to control the price at which a dealer supplies the product; or (ii) to discriminate between consignees and other dealers. The key issue under this provision would normally be whether a person has an anticompetitive purpose or sound business reasons for engaging in consignment selling. No applications have been made by the Director to the Tribunal or the RTPC pursuant to this provision.

**(C) EXCLUSIVE DEALING, TIED SELLING AND MARKET RESTRICTION**

Exclusive dealing, tied selling and market restriction are all dealt with under section 49 of the Competition Act. For the purposes of this section, exclusive dealing can take two forms. The first involves a supplier requiring a buyer to buy only or primarily from him/her or his/her nominees,



and not to buy competing products. The second situation involves a supplier inducing a buyer to deal only in his/her or his/her nominees' product by offering to supply the product on more favourable terms or conditions.

The practice of tied selling may take three forms. The first involves a requirement by a supplier that the buyer acquire a second product from a supplier or his/her nominee as a condition of being granted supply of a first (and usually highly desirable) product. A second form involves requiring a customer to refrain from using or distributing, in conjunction with the tying product, another product not manufactured by or designated by the supplier or his/her nominee. The final form of tied selling involves offering the tying product on more favourable terms or conditions, if the buyer agrees to either of the first two forms of tied selling.<sup>9</sup>

In order to be the subject of a remedial order by the Competition Tribunal, the practices of exclusive dealing and tied selling must be shown to meet specific statutory tests. The practice must be shown to be engaged in by a major supplier or to be widespread, and must also be shown to be likely to:

- a) impede entry into or expansion of a firm in the market;
- b) impede introduction of a product into or expansion of sales in the market; or
- c) have any other exclusionary effect in the market;

with the result that competition is or is likely to be lessened substantially.

The third practice under section 49 is market restriction. For the purposes of the section, market restriction is defined as any practice whereby a supplier of a product, as a condition of supplying a customer, requires the customer to sell or supply the product only in a defined market, or exacts a penalty of any kind if the customer breaches such a condition. As in the case of exclusive dealing and tied selling, to be the subject of an order by the Tribunal, market restriction must be shown to meet specific statutory tests. In particular, the Director must establish that, because it is engaged in by a major supplier of a product or is widespread in a market, the practice of market restriction is likely to substantially lessen competition.

Orders issued by the Tribunal in exclusive dealing, tied selling and market restriction cases will normally require the cessation of the practice. In addition, with regard to exclusive dealing and tied selling, the Tribunal may include in such order any other requirements that, in its opinion, is necessary to overcome the effects of the practice, or to restore or stimulate competition in the market. In regard to market restriction, the Tribunal may include any other requirement that is necessary to restore or stimulate competition in relation to the product.

In considering the scope and application of the foregoing provisions, it is important to note the exceptions to the provisions which are outlined in subsections 49(4), (5) and (6) of the Act. Several of these are relevant to product distribution and franchise systems. In particular, paragraph 49(4)(a) stipulates that the Tribunal may not make an order in respect of either exclusive dealing or market restriction when these practices are engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market. Paragraph 49(4)(b) states that the Tribunal may not make an order where tied selling is reasonable because of the technological relationship between or among the products to which it applies. Paragraph 49(4)(c) provides that no order may be made regarding tied selling where it is engaged in by a person in the business of lending money for the purpose of better securing loans made by him/her, and where the practice is reasonably necessary for this purpose.

Subsection 49(4) also indicates that no order can be made in respect of exclusive dealing, tied selling or market restriction among enterprises that are affiliated. Subsection 49(5) clarifies that, for purposes of this exception, enterprises are deemed to be affiliated when (a) one company is the subsidiary of the other, or both are subsidiaries of the same company, or each of them is controlled by the same person; (b) two companies are affiliated with

the same company at the same time; and (c) a partnership or sole proprietorship and another partnership, sole proprietorship or a company are controlled by the same person.

In addition, paragraph 49(5)(d) provides that enterprises are also deemed to be affiliated when one party grants to the other party the right to use a trade mark or trade name to identify the business of the grantee. This provision applies only if the business is related to the sale or distribution (pursuant to a marketing plan or system prescribed substantially by the grantor) of a multiplicity of products obtained from competing sources of supply, and a multiplicity of suppliers, and no one product dominates the business. This is a so-called "Canadian Tire exemption" although this description probably fits several other franchise systems as well.<sup>10</sup>

Finally, in relation to market restriction, subsection 49(6) provides that businesses are also deemed to be affiliated where there is an agreement whereby one person supplies or causes to be supplied to another person an ingredient or ingredients for use in the food and beverage industry. This provision applies only when the second person processes the ingredients by the addition of labour and material into an article of food or drink that he/she then sells in association with a trade mark that the first person owns or of which the first person is a registered



user. This is the so-called "soft drink bottlers' exemption." It may also fit other franchise systems.

To date there have been no applications by the Director to the Competition Tribunal or the Restrictive Trade Practices Commission in respect of the practice of market restriction. The practices of exclusive dealing and tied selling, however, have each been the subject of a case before the Commission.

In the first of these cases, Director of Investigation and Research v. Bombardier, the Director applied to the Commission for an order requiring Bombardier to cease its practice of exclusive dealing with respect to its snowmobile products, and to resupply a number of dealers that it had terminated for selling competing brands of snowmobiles. The RTPC's decision of October 1980, which declined to grant the order requested by the Director, provided interpretations of key words and phrases not only contained in the exclusive dealing provision, but also concerned with tied selling and market restriction.

In discussing the terms "major supplier," the RTPC stated:

A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets in which it sells. Where available, a firm's market share is a good indication of its importance since its ability to gain market share summarizes its capabilities in a

number of dimensions. Other characteristics of a supplier which might also be used in assessing its importance in an industry are its financial strength and its record as an innovator.<sup>11</sup>

The RTPC then examined Bombardier's market share vis-à-vis sales and dealerships, noting competitors' impressions of Bombardier's market position and Bombardier's strong historical position in the industry. The RTPC ruled that Bombardier was a major supplier to the North American market, with a market share of approximately thirty per cent.

The Director's application was unsuccessful in establishing that Bombardier's practice lessened competition substantially. In reaching this determination, the RTPC examined the change in relative market shares, the availability of existing and potential dealers, the effect of the practice on competitors and retailers, and the ability of competitors to achieve sufficient sales to enable them to produce at reasonable cost.

The RTPC found that two other suppliers were able to recruit new dealers and that their sales permitted them to support adequate distribution systems. At the retail end, the RTPC determined that there was no evidence of a significant number of communities in which only the Bombardier brand of snowmobile was available to consumers, nor was there evidence that Bombardier dealers had suffered from

their inability to carry more than one line of snowmobiles. As a consequence, the RTPC concluded that the evidence "... does not show a substantial lessening or reduction of competition nor a likelihood thereof."<sup>12</sup>

The second case dealt with by the Restrictive Trade Practices Commission under section 49, BBM Bureau of Measurement, is the only reviewable matter in which the Director has secured an order from the RTPC. BBM was engaged in the business of measuring audience levels for radio and television programmes and providing the results to advertisers, advertising agencies and radio and television stations. The Director's application alleged that BBM forced customers to purchase television data in order to receive radio data, of which it was the sole supplier in Canada. It was further alleged that this practice impeded the expansion of a firm in the television data market, A.C. Nielson, and was likely to impede the entry of others into both the radio and television data markets.

In its decision, the RTPC found that BBM had engaged in tied selling, that the practice had lessened competition substantially, and was likely to continue to do so. BBM argued that no sales of any kind had in fact occurred, since it was an association of data users who received data in return for annual membership fees. As such, BBM contended that it neither had customers, nor made any sales. The RTPC rejected this position, finding that:

While BBM is organizationally structured as an association, its members are, in fact, also customers to whom it supplies its products like any commercial firm.<sup>13</sup>

BBM also sought to take advantage of the defence found in paragraph 49(4)(b) of the Act which states that an order shall not be made in tied selling cases if the practice is "reasonable having regard to the technological relationship between or among the products to which it applies." The RTPC did not accept this view, holding instead that:

Undoubtedly, cost efficiencies and useful technological exchange can be expected to flow from producing two similar products under one roof. However, section 31.4(4)(b) [now ss. 49(4)(b) of the Competition Act] applies to the reasonable requirement of the sale of two products together for technological reasons, not to their production. In effect, the section provides a defence or justification of a tied sale on the basis that the reputation of the tying product might be injured or destroyed if the supplier cannot insist on a purchaser using only the tied product in conjunction with it.

In the present instance, there is no suggestion that the reputation or goodwill of either of BBM's reporting services would be damaged by the purchaser not using the other service. Section 31.4(4)(b) has no application.<sup>14</sup>

The treatment of exclusive dealing, tied selling and market restriction under section 49 of the Competition Act is broadly analogous to the treatment of these practices under the corresponding U.S. law. Under the relevant statutory provisions and U.S. Supreme Court decisions, both exclusive dealing and territorial market restriction are generally dealt with under a standard known as the "rule of reason," which requires a balancing of the anti- and pro-



competitive effects of such practices in individual cases. The rule of reason approach to territorial market restraints was laid down in the well-known U.S. Supreme Court Sylvania decision.<sup>15</sup>

One difference between Canadian and U.S. law is that, in the U.S., tied selling is nominally subject to a per se prohibition. However, this per se rule is subject to significant threshold requirements such as the presence of substantial market power in the tying product market. The 1984 U.S. Supreme Court decision in Jefferson Parish Hospital District No. 2 v. Hyde emphasized the importance of these threshold requirements, thereby limiting the application of the per se prohibition of tying arrangements.<sup>16</sup> Through such decisions, the U.S. law regarding non-price vertical restraints has moved closer to that of Canada.<sup>17</sup>

The case-by-case approach to exclusive dealing, tied selling and market restriction under the Competition Act also reflects the prevailing economic wisdom regarding these practices. The weight of economic opinion supports the view that, depending on the circumstances, these practices may be anticompetitive, procompetitive or competitively neutral.<sup>18</sup> Such practices often restrict competition within an individual product brand or franchise system, and sometimes create barriers to entry for new competitors. On the other hand, they often serve to strengthen competition among competing brands ("interbrand" competition) by helping establish more efficient product distribution systems. The

wording of section 49 permits the Director and the Competition Tribunal to take account of both the pro- and anticompetitive effects of these practices in assessing their impact.

**(D) ABUSE OF DOMINANT POSITION**

The abuse of dominant position provisions of the Competition Act (sections 50 and 51) are a key aspect of the 1986 competition law amendments. These provisions replace the monopoly section of the Combines Investigation Act, which was a criminal provision. The abuse of dominance provisions are a "state of the art" approach to legislation in this area, drawing on aspects of antitrust law and jurisprudence in Canada, the U.S. and the European Economic Community, as well as using relevant economic theory.<sup>19</sup>

Subsection 51(1) -- the substantive provision under which abuse cases are to be brought before the Competition Tribunal -- requires proof of three elements:

- a) that one or more persons substantially or completely control a class or species of business throughout Canada or any area thereof;
- b) that person or persons have engaged in a practice of anticompetitive acts; and
- c) that the practice has had, is having, or is likely to have, the effect of preventing or substantially lessening competition.

The other subsections of section 51 contain provisions dealing with remedial orders, the relationship of anti-competitive acts to "superior competitive performance," the application of section 52 to intellectual property rights, a limitation period, and the interface of abuse of dominance with other sections of the Act dealing with mergers and conspiracies. Section 50 provides an illustrative list of anticompetitive acts to which section 51 applies.

The first element to be proven by the Director under subsection 51(1) is the requirement to show substantial or complete control of a class or species of business by one or more persons. From the perspective of franchise systems, the reference to "one or more persons" is significant. A leading judicial interpretation of this wording implies that it covers independent corporations where they co-ordinate their activities to work together as a unit.<sup>20</sup> Whether a franchisor occupies a dominant position in a class or species of business may therefore depend partly on the degree of control which it exercises over its franchisees.

The concept of a class or species of business referred to in paragraph 51(1)(a) may in some cases be different from the concept of a product market which is incorporated in paragraph 51(1)(c). While the latter concept takes account of substitution possibilities in production and consumption, relevant jurisprudence under the Combines Investigation Act suggests that the former may not.<sup>21</sup>

It is unlikely that Parliament would have used these different terms in the same subsection unless it intended that they should be given different meanings. Similarly, the concept "any area of Canada" may be narrower and more arbitrarily defined than the relevant geographic market, which should take account of the possibility of trans-shipment of a product across different geographic areas.

The test whether a person or persons "substantially or completely control" a class or species of business throughout Canada or any area thereof is, however, a functional one. It requires consideration of factors such as market shares, concentration, economic or institutional entry barriers, etc.

The second requirement to be proven under subsection 51(1) is that the dominant firm or firms have engaged in a practice of anticompetitive acts. For analytical purposes, this requirement can be separated into two elements: (i) anticompetitive acts; and (ii) the practice of such acts.

To help apply section 51, section 50 provides an illustrative list of anticompetitive acts. The list includes: (i) margin squeezing by a vertically integrated supplier; (ii) vertical acquisitions by customers or suppliers; (iii) the selective use of "fighting brands;" (iv) the pre-emption of scarce facilities or resources required by a competitor for operation of a business; and (v) requiring a supplier to sell only to certain customers,



or to refrain from selling to a competitor. Each of the acts in the list includes an anticompetitive element, such as eliminating or preventing the expansion of a competitor, or withholding scarce resources from a market.

Despite the list of anticompetitive acts in section 50, it is important to note that the concept of an anti-competitive act is deliberately left open-ended in the statute. The opening words of section 50 indicate that the illustrative list is provided "without restricting the generality of the term." Furthermore, while each of the examples of anticompetitive acts contains a purpose element of some kind, Parliament has expressed these elements in different ways.<sup>22</sup> This supports the view that Parliament intended to give a liberal interpretation to the concept of anticompetitive acts.<sup>23</sup>

The concept of a practice is well known in Canadian competition law. The term "practice" appears in the price discrimination and price maintenance provisions of the Competition Act, and in the provisions dealing with consignment selling, exclusive dealing, tied selling and market restriction. The leading cases under these provisions indicate that the concept is distinct from an isolated act or acts.<sup>24</sup> Characteristics of a practice include the duration, uniformity and consistency of specific acts.<sup>25</sup> It should be noted that the establishment of a practice may not

necessarily require repeated instances of the same act; two or more acts of different types might suffice if they establish an identifiable pattern.

The third element is subsection 51(1) requires the Director to show that the practice of anticompetitive acts has had, is having or is likely to lessen competition substantially. This is similar to the test found in section 64 of the Competition Act dealing with mergers, and in section 49 concerning tied selling, exclusive dealing and market restriction. A similar test is also found in the U.S. in section 7 of the Clayton Act, which is the principal provision under which mergers are reviewed in the country. The Canadian and U.S. cases under these provisions indicate that the test is functional, and permits consideration of market shares, concentration, entry conditions and other economic factors relevant to the competitive effects of the practice.<sup>26</sup>

One possible application of the abuse provisions to franchise systems concerns the practice of land banking, whereby a franchisor purchases real estate for which it does not have a present use. It might be argued that this may fall within the anticompetitive act described in paragraph 50(e), i.e., pre-emption of scarce facilities or resources required by a competitor for operation of a business. However, in any such case the other elements of the section have to be established as well:

- a) that the franchisor and/or its franchisees have to control a class or species of business throughout Canada or an area thereof;
- b) that there would have to be a practice of land banking, not just an isolated incident;
- c) that the object of the practice is to withhold the facilities or resources from a market;
- d) that the practice is shown to prevent or lessen competition substantially.

A final aspect of the abuse of dominance provisions related to franchise systems is the exception for intellectual property rights in subsection 51(5). This provision states:

For purposes of [section 51], an act engaged in pursuant only to the exercise of any right or the enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Patent Act, Trade Mark Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anticompetitive act.

The reference to the Trade Marks Act is of particular significance for franchise systems.

Subsection 51(5) indicates clearly that section 51 is not intended to affect the legitimate exercise of intellectual or industrial property rights. The wording covers not only express rights but also interest "derived under" the relevant statutes, perhaps through the operation of licensing agreements. However, subsection 51(5) does not provide a blanket exemption for intellectual property rights holders. The phrase "pursuant only to the exercise [of such

rights]" suggests that section 51 remains applicable to the use of intellectual property rights in ways which go beyond the purposes contemplated in these other statutes. Thus, the language of subsection 51(5) would arguably permit the application of section 51 to acts considered to be abuses of intellectual property rights.<sup>27</sup>

In sum, the reviewable matters provisions of the Competition Act deal with conduct such as refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and abuse of a dominant position. These provisions are directly relevant to business practices in the product distribution field. However, in each case the application of the reviewable matters provisions is limited by specific statutory tests that are intended to identify conduct likely to be harmful to competition. The application of these provisions in the product distribution field is also limited by exceptions relating to trade marks.

### III THE TREATMENT OF PRICE MAINTENANCE

#### (A) RELEVANT COMPETITION ACT PROVISIONS AND JURISPRUDENCE

In 1952, Canada became the first country to enact a specific legislative ban on price maintenance and related activities. This ban was in response to the recommendations of the MacQuarrie Committee Report and the growth of price maintenance in several merchandising industries as a result



of their experience under regulation by the Wartime Prices and Trade Boards.<sup>28</sup> The existing provisions of the Combines Investigation Act were considered inadequate to deal with such activities.

In the 1950s, considerable attention was focussed on the perceived impact on small businesses of loss-leader selling. In 1960, the Act was amended to provide defences to aspects of the ban on price maintenance in certain circumstances, including situations where a manufacturer believed that his product was being used as a loss leader.<sup>29</sup> To some extent, these defences accommodate procompetitive rationales for price maintenance activities that are advanced in modern economic literature.

In 1976, Canada's price maintenance provisions underwent a number of further revisions, as part of the Stage I amendments to the Act.<sup>30</sup> First, the provisions were extended to cover services as well as articles. Second, the wording of the section was broadened to cover not merely the specification of minimum resale prices, but more generally, attempts to influence upward or to discourage the reduction of the prices at which products are sold. The revised wording is applicable to horizontal as well as vertical price maintenance.<sup>31</sup> In addition, the amendments clarified that price maintenance is prohibited where it is achieved through the exercise of a patent, trade mark, copyright or registered industrial design.<sup>32</sup> Parliament also added to

the Combines Investigation Act a specific sub-section dealing with attempts to induce refusal to supply for reasons of price discounting.<sup>33</sup> The price maintenance provisions of Canada's competition legislation were not significantly modified by the major 1986 amendments to the Act.<sup>34</sup>

Turning to the specific terms of the price maintenance provisions, paragraph 38(1)(a) of the Competition Act provides that no person who is engaged in the business of making or selling a product shall, directly or indirectly

by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in a business in Canada supplies or offers to supply or advertises a product within Canada.

This prohibition also applies to persons who extend credit by way of credit cards or are otherwise engaged in a business that relates to credit cards.

Several points should be noted regarding the wording and interpretation of paragraph 38(1)(a). First, in order to establish an offence under this provision, the Crown does not need to prove that a supplier actually succeeded in influencing upward or discouraging the reduction of another person's prices. A mere attempt to influence prices in this way can suffice. The jurisprudence confirms that acquiescence by the person whom the accused has attempted to influence is not necessary to support a conviction.<sup>35</sup>

Second, paragraph 38(1)(a) applies to such attempts only where they take the form of "agreements, threats, promises or any like means." The courts have generally

given a broad interpretation to this requirement. Some examples of situations in which the courts have found attempts to influence upward or discourage the reduction of prices in this matter include:

- a) co-operative advertising schemes in which a supplier makes his participation contingent on an agreement not to advertise at discount prices;<sup>36</sup>
- b) the provision of rebates on sales that are made at manufacturers' suggested list prices;<sup>37</sup>
- c) removal or threats to remove special allowances if a retailer initiates downward price changes;<sup>38</sup>
- d) the offering of inducements to comply with suggested prices, such as: (i) an offer to supply an additional, highly desired product; or (ii) an offer to force other retailers to adhere to suggested prices.<sup>39</sup>

It should be noted that the prohibition of price maintenance activities in paragraph 38(1)(a) clearly encompasses both concerted and unilateral action by suppliers. As discussed below in Part III (3), in this respect the prohibition of price maintenance in Canada is broader than the corresponding prohibition of vertical price fixing in the U.S.

Paragraph 38(1)(b) of the Act makes it a separate offence for any person directly or indirectly, to refuse

to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

In effect, it is an offence to refuse to supply on the basis of price discounting. Depending on the facts, a person may be charged under both paragraphs 38(1)(a) and 38(1)(b).

In addition to the offences in subsection 38(1), subsection 38(6) of the Competition Act provides

that no person shall, by threat, promise or any like means, attempt to induce a supplier, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

This provision is directed at controlling possible attempts by dealers to initiate refusals by their suppliers to supply to competing, lower price distributors. Violation of subsection 38(1) or subsection 38(6) is an indictable offence and is punishable by a fine in the discretion of the court or imprisonment for five years or both. There is no provision for summary proceedings under this section.

Regarding the issue of mens rea, it has been held in several cases that it is not necessary for the Crown to prove that an accused person intended to have the effect of maintaining higher-than-competitive price levels. Rather, it is sufficient to support a conviction under section 38 if the Crown shows that the accused knowingly carried out the acts which constituted the offence.<sup>40</sup>



There are several exceptions to the price maintenance provisions that are important in the context of product distribution systems. Subsection 38(2) provides that subsection 38(1) does not apply in situations involving affiliated companies or directors, agents, officers or employees of (a) the same company, partnership or sole proprietorship, or (b) companies, partnerships or sole proprietorships that are affiliated. In addition, subsection 38(2) provides that subsection 38(1) does not apply in situations where the person attempting to influence the conduct of another person and that other person are principal and agent.

In the majority of cases, franchise systems are unlikely to qualify for the principal-agent exception. The limited nature of the control exercised over franchises by most franchisors is inconsistent with a principal-agent relationship. In some cases of "tight" franchise systems, however, the degree of control exercised by the franchisor might be argued to give rise to a principal-agent relationship.<sup>41</sup> In the context of a proceeding under the Competition Act, the burden of establishing such a relationship would clearly be on the accused person(s).

Subsections 38(3), (4) and (5) clarify the treatment of suggested resale prices under the price maintenance provisions. Subsection 38(3) provides, in effect, that producers or suppliers who make suggestions regarding the

resale prices of their products must, in order to avoid liability under the price maintenance provisions, also make clear to the person to whom the suggestion is offered that he is under no obligation to accept the suggestion. In the absence of proof to this effect, the making of suggestions respecting resale prices is deemed to be proof of an attempt to influence the person in accordance with the suggestion offered. Subsection 38(4) clarifies further that advertisements published by a supplier of a product, other than a retailer, that mention a resale price for the product, must make clear that the product may be sold at a lower price. Unless this is done, the publication of such an advertisement is deemed to constitute an attempt to influence the selling price upward.

The courts have held that subsections 38(3) and (4) do not constitute offences in themselves. Rather, they are examples of attempts to influence prices that may fall within the conduct proscribed in paragraph 38(1)(a).<sup>42</sup> In addition, it may be noted that subsection 38(5) indicates that subsections 38(3) and (4) do not apply to prices that are merely affixed or applied to a product or its package or container.

In considering the scope of the Competition Act provisions respecting price maintenance, it is important to note the limitations incorporated in subsection 38(9) of the Act. In effect, this subsection provides a defence to a

person charged with refusal to supply under paragraph 38(1)(b), where he believes that the person he has refused to supply has made a practice of: (i) using products supplied by the person charged as loss-leaders; (ii) using such products not for the purpose of selling them at a profit but for the purpose of attracting customers to his store (e.g., for bait and switch selling); (iii) engaging in misleading advertising in respect of such products; or (iv) failing to provide the level of service that might reasonably be expected by purchasers of such products. To some extent, these exceptions accommodate the positive rationales for price maintenance activities which have been advanced by modern antitrust scholars.<sup>43</sup> It should be noted, however, that the exceptions in subsection 38(9) do not apply to the basic offence of price maintenance under paragraph 38(1)(a), nor do they apply to the offence of inducement to engage in refusal to supply under subsection 38(6).

The loss-leader defence was judicially considered in the Lee Jeans case. Essentially, the Court defined loss-leader selling as a sale at a price below invoice cost. In its decision, the Court reaffirmed an interpretation established earlier in the Philips case:

In my view the words "loss-leaders" as used in this section can only mean selling at less than cost...

Words in a statute must be read in their ordinary sense, and the ordinary sense to me of these words [is] selling at less than the actual cost. If the Legislature had intended the Court to take into consideration the cost of doing business, surely this would have been spelled out in the legislation...<sup>44</sup>

In applying this interpretation, the Court stated further:

It was argued by the defence that loss leading is not an accounting or book-making matter but a merchandising practice matter. That the test is not whether a profit is made but whether the article is sold "not for the purpose of making a profit thereon, but for the purposes of advertising." According to this argument Parliament did its best to indicate the nature of loss-leading by the use of those words, and what is legally significant is not whether or [not] a retailer makes a profit but whether the retailers sells the product with regard to making a profit or with regard to advertising. Such an interpretation would, in my opinion... defeat the very purpose of section 38 of the Combines Investigation Act on resale price maintenance...

The term used in the statute is not "leader" which is defined in Webster as: "an article offered at an attractive special low price to stimulate business," but loss-leader which clearly indicates a meaning of selling at a loss or at least without a profit.<sup>45</sup>

From the standpoint of product distribution systems, the application of the level of servicing defence is also of interest. The courts have emphasized that the test of paragraph 38(9)(d) is the level of servicing expected by customers and not the level desired by the manufacturer.<sup>46</sup> In the absence of complaints from customers about inadequate servicing by a retailer, this defence is unlikely to apply. The cases also confirm that the defences in subsection 38(9)



are available only in respect of refusal to supply for reasons of low prices.<sup>47</sup>

Cases involving price maintenance activities have traditionally accounted for a substantial proportion of judicial proceedings under the Competition Act. During the year ending March 31, 1987, proceedings were completed in sixteen price maintenance cases that were referred directly to the Attorney General of Canada. This compared with four cases in which proceedings were completed under the conspiracy and bid-rigging provisions.<sup>48</sup>

The courts have generally imposed significant fines on parties convicted of offences under section 38. The principles involved in determining the sentence in such cases were reviewed by the Ontario Court of Appeal in R. v. Browning Arms Co. of Canada Ltd. in 1974. The Court stated:

Where a corporation is convicted under s. 38, the first consideration in determining an appropriate sentence is the same as with any other criminal offence -- protection of the public interest. The offence is not a trivial one. It is indictable. The section's role in the protection of free competition has commercial importance, and breach of it has important economic implications and consequences.

The aspect of deterrence to others who might be tempted to commit similar offences is clearly an important factor to be taken into account. The penalty imposed must not be so small as to be regarded by the accused or by other corporations as a licence fee for carrying on business in a manner contrary to law.

The aspect of deterrence to the convicted corporation is also of importance, although not of as great

importance as that of deterrence to others, because a convicted corporation is less likely to commit the identical offence again, and in any event the making of an order of prohibition against repetition or continuation of the offence now takes place almost as a matter of course, following conviction. Such an order was made in this case.

The size of the convicted corporation, the scale of its operations, the range of products sold by it and of products affected by the illegal practice are all questions to be taken into account. The nature of the market itself, in the particular commodities which are the subject of the charge, is also a matter of consideration. Does the accused company sell a wide range of products, or only a few? Does it have many competitors with respect to those products, or only a few? Are its products sold by thousands of dealers, or only by carefully selection "franchise holders"?<sup>49</sup>

The reasoning of the Ontario Court of Appeal in Browning Arms was applied by the County Court for the Judicial District of York in the Levi Strauss case.<sup>50</sup> In this case, the Court assessed a fine of \$18,750 on each of eight counts, for a total of \$150,000. In December 1987, in the Epson case, the Court imposed a fine of \$200,000 (under appeal).<sup>51</sup> In other cases under the price maintenance provisions, courts have imposed fines of \$100,000, \$75,000, \$50,000, and \$40,000.<sup>52</sup>

#### (B) ECONOMIC PERSPECTIVES ON PRICE MAINTENANCE

The treatment of price maintenance under the Competition Act reflects the social perception of this practice at the time the sections were enacted. In the 1950s and 60s, it was widely believed that the suppression

of price competition in the market, even within a single manufacturer's brand, was inherently harmful to consumer welfare. It was also believed that price maintenance facilitated collusion among competing manufacturers in a market.<sup>53</sup>

In the 1970s and 80s, the basis of these concerns has been questioned by academic commentators. These commentators have suggested that in many cases the use of price maintenance within individual product distribution chains is not harmful to consumers, and may even facilitate the establishment of efficient distribution systems.<sup>54</sup> On the basis, it has been suggested that consideration be given to treating price maintenance as a non-criminal reviewable matter.<sup>55</sup>

The academic discussion over the treatment of price maintenance is based on a re-evaluation of the economic effects of and rationale for the practice. The basic argument that the suppression of intra-brand competition at the retail level is by itself harmful to consumers has been extensively analyzed. Economists have argued that, in general, manufacturers will prefer the lowest possible profit margins for their products at the retail level that are consistent with sales maximization.<sup>56</sup> That is, it would normally be against the interests of individual manufacturers to raise the resale prices of their products unless this facilitates accompanying changes in the distribution

system that stimulate increased demand for the products.<sup>57</sup> In the absence of other anticompetitive purposes, it has been argued that a manufacturer's decision to enforce resale price for his own brand may be merely a part of an efficient marketing strategy.

Concerns that price maintenance can facilitate collusion among manufacturers of competing brands have also been extensively discussed. In this view, fixed retail prices reduce the incentive of individual members of a cartel to discount their wholesale prices, since such price cuts are less likely to generate additional sales at the retail level. The use of price maintenance by manufacturers of large electric lamps in Canada and electric light bulb manufacturers in the U.S. were probably examples of such use of the practice to facilitate horizontal collusion.<sup>58</sup> In considering such cases, however, analysts have noted that the use of price maintenance is incidental to the central concern: the underlying horizontal agreement among competing firms. It has been argued that the latter may be dealt with directly under competition law conspiracy provisions.

The danger that price maintenance may be used by individual manufacturers to deny distribution channels to potential rivals has also been widely discussed. According to this view, the anticompetitive effects of price maintenance involve the erection of entry barriers. This is also a widely-cited concern regarding the effects of



non-price vertical restraints such as exclusive dealing and market restriction. The use of price maintenance by the U.S. sugar and tobacco trusts was probably intended for this purpose.<sup>59</sup> However, as discussed earlier, in both Canada and the U.S. non-price vertical restraints are generally treated case by case. To the extent that the effects of price maintenance are similar to those of non-price vertical restraints, it has been argued that they should be subjected to a similar standard under relevant competition law.

Another common concern about price maintenance activities is that retailers may induce manufacturers to engage in the practice as a means of obtaining supra-competitive retail profit margins.<sup>60</sup> In effect, manufacturers are induced (perhaps with a higher wholesale price) to police cartel arrangements among dealers and to protect them from discount retailers. The prominent role of U.S. retail industry associations, especially druggists and liquor distributors, in lobbying for fair trade legislation is often noted in connection with this view. In response to this concern, it has been suggested that in many retail trades, entry is too easy to permit supra-competitive profit margins.<sup>61</sup> Thus, while the dealer cartel hypothesis undoubtedly accounts for some specific instances of price maintenance, it may not provide a general explanation for the practice.

The case for liberalizing the treatment of price maintenance also reflects the view that it can be used to facilitate more efficient distribution of goods and services. This, it has been argued, may occur in several ways. For example, price maintenance may in some cases facilitate more rapid introduction of new products by increasing the number of outlets stocking the product.<sup>62</sup> The demand for consumer goods is considered to be positively related to the number of outlets stocking the product.<sup>63</sup> According to this theory, price maintenance can provide the margins necessary to make a new product attractive to retailers.

A number of economists have suggested that price maintenance may also be used to create incentives for the provision of point-of-sale information and special services by dealers. The demand for many products depends on the wide availability of accurate information on their uses and features. In the absence of price maintenance, the provision of such information may be subject to free riding by discount retailers. This undermines the viability of full service dealers, resulting in an overall reduction in the availability of information in the market. It has been argued that this theory explains the use of price maintenance in industries such as audio and video equipment and computers.<sup>64</sup>

A related rationale for price maintenance that has received considerable attention in Canada is the prevention of loss-leader selling. Manufacturers have long argued that loss-leader selling damages the reputation and erodes the normal sales value of their products.<sup>65</sup> This results in reduced availability and diminished sales. However, an extensive inquiry by the Restrictive Trade Practices Commission in the 1950s concluded that the detrimental consequences of loss-leader selling had been exaggerated, and that many alleged instances of the practice are in fact merely aggressive price competition.<sup>66</sup>

The implications of these analytical developments for Canadian law require careful consideration. The revisionist view of price maintenance is not universally accepted. A number of antitrust scholars remain of the view that price maintenance is intrinsically harmful to consumers.<sup>67</sup> Furthermore, it has been argued that in a number of industries where price maintenance has been observed, there is no apparent danger of free riding that would justify the practice.<sup>68</sup>

In addition, to some extent, the procompetitive rationales for price maintenance mentioned earlier are already accommodated by the defences set out in subsection 38(9) of the Competition Act. Paragraph 38(9)(d) provides a defence to a charge of refusal to supply to a low price dealer in situations where the dealer fails to provide the

expected level of servicing. It must be noted, however, that the defences in subsection 38(9) apply only to a charge of refusal to supply under paragraph 38(1)(b).

### (C) U.S. LAW RESPECTING PRICE MAINTENANCE ACTIVITIES

In the U.S., price maintenance is not dealt with specifically in the antitrust statutes but is governed by the judicial interpretation of section 1 of the Sherman Act. In addition, it should be noted that the U.S. case law is somewhat narrower than the corresponding Canadian statutory provisions, in that it is concerned only with the Resale Price Maintenance (RPM). In other words, the U.S. case law is concerned with vertical price fixing agreements. Horizontal arrangements among competitors in the U.S. are dealt with under separate jurisprudence.

In the 1911 case of Dr. Miles Medical Co. v. John D. Park and Sons Co. the U.S. Supreme Court held that vertical price fixing agreements were inherently anticompetitive and therefore illegal per se under the Sherman Act. The Court reasoned, "The manufacturer having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."<sup>69</sup>

The U.S. per se rule was effectively suspended by the Miller-Tydings Act of 1937, which exempted RPM agreements from the antitrust laws when authorized by state "fair



trade" statutes. The McGuire-Keough Act of 1952 went beyond the Miller-Tydings Act to authorize enforcement of resale price agreements against non-signing distributors.<sup>70</sup> That is, the Act provides that all dealers within a state could be bound to minimum prices as long as one of them had signed a contract to this effect. The U.S. Supreme Court's holding in Dr. Miles was reinstated in 1975, when Congress repealed the Miller-Tydings and McGuire-Keough Acts.

Since 1975, two inconsistencies in the U.S. law of vertical restraints have forced a partial reconsideration of the prohibition of RPM.<sup>71</sup> First, in the view of a number of commentators, the per se prohibition of RPM is at odds with the more permissive treatment of non-price vertical restraints in the U.S. As noted above in Part II, in the landmark case of Continental T.V. Inc. v. G.T.E. Sylvania (1977), the U.S. Supreme Court rules that restrictions on the territories within which a distributor may sell, or the customers with whom he may deal, were to be judged under a rule of reason.<sup>72</sup> The Court reasoned specifically that non-price vertical restraints may be beneficial to consumers, in that they permit manufacturers to establish service-oriented distribution systems that would otherwise be undermined by free riders. Since 1977, the rationale for the Supreme Court's treatment of non-price vertical restraints has increasingly been viewed as applicable to RPM as well. As Mr. Justice White suggested in a concurring opinion in

Sylvania, "the effect, if not the intention, of the Supreme Court's opinion is necessarily to call into question the firmly established per se rule against price restraints."

Second, the prohibition of vertical price fixing in the U.S. is at odds with the treatment of unilateral price maintenance in that country. The per se rule in Dr. Miles is aimed at price fixing agreements -- i.e., conspiracies between a manufacturer and his distributors to establish minimum prices. This is consistent with its foundation in section 1 of the Sherman Act, dealing with contracts, conspiracies and combinations in restraint of trade. In its 1919 decision in U.S. v. Colgate, the Supreme Court held that unilateral price maintenance by manufacturers is permissible.<sup>73</sup> That is, a manufacturer can merely announce its resale prices in advance and refuse to deal with those who fail to comply.<sup>74</sup> In practice, the fact situations covered by Colgate and Dr. Miles were difficult to distinguish.

In the 1984 case of Monsanto Co. v. Spray-Rite Service Corp., the Supreme Court received a brief from the U.S. Department of Justice urging it to overturn the per se rule in Dr. Miles.<sup>75</sup> The Court chose not to overturn Dr. Miles but to clarify the application of the rule in that case. It stated that an unlawful agreement may not be inferred merely from the termination of a distributor in response to complaints of price cutting from competing dealers. Rather,

there must be evidence that "tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently" and that demonstrates "conscious commitment to a common scheme to achieve an unlawful objective." The Court indicated specifically that it wished to fortify the doctrines in Colgate and Sylvania.<sup>76</sup>

The application of the per se prohibition of resale price maintenance was further clarified by the U.S. Supreme Court in its 1988 judgment in Business Electronics Corp. v. Sharp Electronics Corp.<sup>77</sup> Building on its reasoning in Monsanto, the Court held that the termination of a low-price dealer by a manufacturer falls within the per se prohibition of resale price maintenance only in circumstances where there is an explicit or implied agreement between the manufacturer and other, non-terminated dealer(s) to set resale prices at some level. It rejected the contention that the existence of an agreement could be inferred merely on the basis of the termination of non-complying dealers. In the course of its decision, the Court summarized its approach as follows:

Our approach to the question presented in the present case is guided by the premises of GTE Sylvania and Monsanto: that there is a presumption in favour of a rule-of-reason standard; that departures from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania.<sup>78</sup>

In considering the implications of these developments, it may be noted that the position taken by the U.S. Department of Justice, and the subsequent judicial narrowing of the per se rule have generated extensive concerns in the U.S. Congress. In 1987, legislation was introduced in the Congress that would have the effect of codifying the per se prohibition of resale price maintenance in the U.S. The Senate Committee report accompanying the legislation is critical of the Administration for failing to file any RPM cases in recent years and for intervening on behalf of the defendants in several privately-initiated cases.<sup>79</sup> A version of the Bill was passed by the House of Representatives in early 1988.

In sum, the price maintenance provisions are criminal sections of the Act that prohibit attempts to influence upward, or discourage the reduction of the prices at which goods are sold in the marketplace. The provisions also establish related offences dealing with refusal to supply a product to persons having a low pricing policy and attempts (e.g., by high price dealers) to induce such refusals. Subsection 38(9) of the Act provides certain exceptions to the offence of refusal to supply to price discounters which are important from the standpoint of distribution systems. As elaborated in this part of the paper, the economic effects and rationale of price maintenance have been extensively discussed by academic commentators in the U.S.



and Canada, especially during the past decade. In the U.S., this debate has been reflected in the subsequent evolution of the case law on resale price maintenance, which has clarified the limits on the application of the per se prohibition of this practice.

#### IV CONCLUDING REMARKS

Distribution is a complex, evolving field with a major impact on diverse sectors of the national economy. The efficient organization of distribution services requires extensive co-operation among firms to provide goods and services to consumers. Restrictions contained in product distribution agreements can raise issues under numerous provisions of the Competition Act. An understanding of these provisions is important to help business persons structure their affairs to avoid potential conflicts with the law.

The reviewable matters provisions of the Competition Act embody a case-by-case approach. These provisions are potentially of broad application in the product distribution field. In each case, however, the application of these provisions is limited by various statutory tests which identify conduct that is materially harmful to competition. This approach is broadly analogous to the treatment of non-price vertical market restraints under the U.S. antitrust laws. It is also consistent with the current

economic wisdom regarding the effects of such practices in the marketplace.

The price maintenance sections of the Act are criminal provisions that prohibit attempts to influence upward, or discourage the reduction of prices at which products are sold or advertised in the marketplace. The provisions also contain related offences regarding refusal to supply a product to persons having a low-pricing policy and attempts to induce such refusals to supply. Violation of the price maintenance provisions is an indictable offence which is punishable by substantial fines or imprisonment.

The treatment of price maintenance under the Competition Act reflects the social perception of this practice at the time the provisions were enacted. In the 1950s and 60s, it was widely believed that the suppression of price competition in retail markets, even within a single manufacturer's brand, was inherently harmful to consumer welfare. In the 1970s and 80s, this view has been challenged by academic commentators, who argue that the use of price maintenance within individual product distribution chains may in some cases be welfare-enhancing. For the present, however, there seems to be no consensus in the Canadian business and legal communities on the need for reform of the price maintenance provisions. The issue merits consideration by all persons active in the product distribution field.

NOTES

1. Competition Act, R.S., c. C-23 as amended, sections 47, 48, 49, 50 and 51. It may be noted that the Act also contains a number of other reviewable matters provisions dealing with matters such as delivered pricing and specialization agreements. These provisions are not covered in this paper.
2. Regarding the merger provisions, see, e.g., Calvin S. Goldman, Competition Policy-Mergers and Acquisitions (Notes for an Address to an Insight Conference, S-10086, May 1988), and Howard I. Wetston, The Merger Review Process (Notes for an Address to an Insight Seminar on Mergers and Acquisitions, Toronto, S-10108, May 1988). Regarding buying groups, see Ian Nielson-Jones, Buying Groups (Notes for an Address to the Ontario Furniture Manufacturers' Association, Toronto, S-84-18, May 1984).
3. The mailing address of the bureau of Competition Policy is:  

Ottawa, Ontario  
K1A 0C9

Requests for copies of speeches or other materials may be directed to the attention of the Director,  
Compliance and Coordination Branch.
4. For an overview of the amendments, see Gordon E. Kaiser and Ian Nielson-Jones, "Recent Developments in Canadian Law: Competition Law," Ottawa Law Review, vol. 18, no. 2, 1986, pp. 401-517. See also B. Dunlop, D. McQueen and M. Trebilcock, Canadian Competition Policy: A Legal and Economic Analysis (Aurora: Canada Law Book, 1987).
5. Director of Investigation and Research and National Rubber Company Ltd., Application pursuant to section 31.2 of the Combines Investigation Act, June 6, 1977 - see Director of Investigation and Research, Annual Report for the Year Ending March 31, 1979, pp. 42-43; Director of Investigation and Research and Imperial Oil Ltd. et al.; Application pursuant to section 31.2 of the Combines Investigation Act, October 31, 1979 - see Director of Investigation and Research, Annual Report for the Year Ending March 31, 1981, p. 39; Director of Investigation and Research and Astral Films Limited et al., Application pursuant to section 31.2 of the Combines Investigation Act, Director of Investigation and Research, Annual Report for the Year Ending March 31, 1985 at p. 49.
6. The commercial value of individual motion pictures tends to decrease over time. The timeliness of supply is thus an important consideration.

7. The undertakings committed the distributors (i) allow independent exhibitors to compete for first run films on a picture-by-picture basis; (ii) not to be a party to an agreement with any exhibitor to determine the pattern of release for films; and (iii) not to grant any exhibitor a right of first refusal.
8. Director of Investigation and Research, Annual Report for the Year Ending March 31, 1982, pp. 30-31.
9. See, generally, R.D. Anderson and S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Tied Selling in the U.S. and Canada," Canadian Competition Policy Record, vol. 6, no. 1, March 1985, pp. 1-14.
10. For the history of this provision, see Mark Q. Connelly, "Exclusive Dealing and Tied Selling under the Amended Combines Investigation Act," Osgoode Hall Law Journal, vol. 14, no. 3, December 1976, pp. 522-69, at pp. 537-38.
11. Director of Investigation and Research v. Bombardier Ltd. (1980), 53 C.P.R. (2d) 47 (R.T.P.C.).
12. Id.
13. Director of Investigation and Research v. BBM Bureau of Measurement (1981), 60 C.P.R. (2d) 26 (R.T.P.C.).
14. Id.
15. Continental T.V. Inc. v. G.T.E. Sylvania, Inc., 443 U.S. 36 (1977).
16. Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984).
17. Anderson and Khosla, supra note 9.
18. See Frank H. Easterbrook, "Vertical Arrangements and the Rule of Reason," Antitrust Law Journal, vol. 53, Issue 1, 1984, pp. 135-73. For insightful discussion, see also F. Mathewson and R. Winter, Competition Policy and the Nature of Vertical Exchange (Toronto: University of Toronto Press for the Royal Commission on the Economic Union and Development Prospects for Canada, 1986).
19. Bruce C. McDonald, "Abuse of Dominant Position," Canadian Competition Policy Record, vol. 8, no. 1, March 1987, pp. 59-75, and R.D. Anderson and S.D. Khosla, "Reflections on McDonald on Abuse of Dominant Position," Canadian Competition Policy Record, vol. 8, no. 3, September 1987, pp. 51-60.



20. R. v. Canadian General Electric Company Ltd. et al (1976), 15 O.R. (2d) 360. For discussion, see McDonald supra note 19, at p. 63.
21. The distinction between a product market and a class of species of business was recognized in the 1953 Eddy Match case. In that case, the Quebec Court of Appeal determined that wooden matches were a separate species of business from paper matches and other lighting devices, despite the apparent substitutability of these articles. Eddy Match Co. v. the Queen (1953), 109 C.C.C. 1.
22. While one of the examples refers to "the purpose of impeding or preventing [a] competitor's entry into, or eliminating him from, a market," another uses the words "to discipline or eliminate a competitor" and still another employs the phrase "the object of withholding ... facilities or resources from a market." A further example refers to the buying up of products "to prevent the erosion of existing price levels."
23. See Anderson and Khosla, supra note 19.
24. R. v. William E. Coutts Co. (1966), 52 C.P.R. 21 (Ont. H. Ct.).
25. Id. See also McDonald, supra note 19.
26. See McDonald, supra note 19 and Anderson and Khosla, supra note 19.
27. Anderson and Khosla, supra note 19. It should be noted, in addition, that section 29 of the Competition Act deals specifically with anticompetitive abuse of patents, trade marks and copyright. This section provides for the issuance of remedial orders, covering matters such as the grant of compulsory licences, by the Federal Court of Canada, upon application by the Attorney General. The basic test that must be satisfied before such remedial orders may be issued - whether these rights are used in ways that lessen competition unduly - is similar to the test applicable under the conspiracy provision of the Act.
28. Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, October 1, 1951 and March 8, 1952; L.A. Skeoch, "Canada," in B.S. Yamey, Resale Price Maintenance (Chicago: Aldine, 1966).

29. See the discussion of subsection 38(9), infra. For further discussion of the legislative history and rationale of the price maintenance provisions, see R.D. Anderson and S.D. Khosla, "Recent developments in the Competition Policy Treatment of Resale Price Maintenance," Canadian Competition Policy Record, vol. 6, no. 4, December 1985, pp. 1-14.
30. The Stage I amendments to the Act were in response to the recommendations in the Economic Council of Canada's Interim Report of Competition Policy. The Report supported retention and strengthening of the prohibition of R.P.M. Economic Council of Canada, Interim Report on Competition Policy (1969), pp. 104-106.
31. See Kaiser and Nielsen-Jones, "Recent Developments in Canadian Law: Competition Law," supra note 4, at p. 440, and cases cited therein.
32. See the opening words of subsection 38(1), Competition Act.
33. See Competition Act, subsection 38(6), discussed infra.
34. The definition of affiliated companies which previously was contained in subsections 38(7) and (7.1) was moved to subsection 2(2) of the Act.
35. R. v. Moffats (1957), 118 C.C.C. 4 (Ont. C.A.).
36. R. v. Moffats, supra note 35. See also R. v. A&M Records of Canada Ltd. (1980), 51 C.P.R. (2d) 225 (Ont. Ct.).
37. R. v. Campbell, [1984] 3 C.C.C. 112 (Ont. C.A.).
38. R. v. Sunoco Inc. (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Ct.).
39. R. v. H.D. Lee of Canada Ltd. (1980), 57 C.P.R. (2d) 186 (Que. Ct. S.P.).
40. R. v. Moffats, supra note 35.
41. For discussion, see Debi Sutin, "Proper Agreement Needed for Long, Happy Relationship," Globe and Mail, Report on Franchising, September 5, 1988, p. C6.
42. R. v. Philips Electronics Ltd. (1981), 2 S.C.R. 264, 126 D.L.R. (3d) 767, aff'g 30 O.R. (2d) 129, 116 D.L.R. (3d) 298 (C.A.). For discussion, see Kaiser and Nielsen-Jones, supra note 4, at p. 441.

43. See Part III(B), infra, and references cited therein.
44. R. v. H.D. Lee (1980), 57 C.P.R. (2d) 186 at p. 196, citing Morand J. in R. v. Philips Electronics Industries Ltd. (1966), 52 C.P.R. 224.
45. R. v. H.D. Lee, supra note 39, at p. 197.
46. Id., at p. 198.
47. R. v. Sunbeam Corp. (Canada) Ltd. (1967), 1 O.R. 23; (1969) 1 D.L.R.. (3d) 161.
48. Director of Investigation and Research, Annual Report for the Year Ended March 31, 1987 (Ottawa: Supply and Services Canada, 1988), Appendix II.
49. R. v. Browning Arms (1974), 15 C.P.R. (2d) 97 (Ont. C.A.).
50. R. v. Levi Strauss (1980), 45 C.P.R. (2d) 215 (Ont. Co. Ct.).
51. R. v. Epson (Can.) Ltd. (1987), C.P.R. (3d) 195 (Ont. D. Co.).
52. See Kaiser and Nielsen-Jones, supra note 4, at pp. 444-45.
53. L.A. Skeoch, "Canada" in Resale Price Maintenance, supra note 28; see also Economic Council of Canada, Interim Report on Competition Policy, supra note 30.
54. See e.g., Mathewson and Winter, supra note 18 and Easterbrook, supra note 18.
55. See Royal Commission on the Economic Union and Development Prospects for Canada, Report (Ottawa: Supply and Services Canada, 1985), p. 224.
56. "The manufacturer's interest is in high demand and therefore a low retail price, ceteris paribus, once the wholesale price has been set." Mathewson and Winter, supra note 18, p. 20.
57. "If a manufacturer adopts RPM willingly, even when there are lower margin distribution alternatives available, the manufacturer must believe that the adoption of the higher margins is a path to greater net-of-margin demand for its product." Howard P. Marvel and Stephen McCafferty, "Journal of Law and Economics, vol. XXVIII(2), 1985, pp. 363-379.

58. See R. v. Canadian General Electric Co. Ltd. (1976), 34 C.C.C. (2d) 489 (electric lamps); and U.S. v. General Electric, 272 U.S. 476 (1926) (light bulbs). Skeoch suggests that price maintenance has been used to facilitate horizontal collusion in a number of additional industries such as sugar, drugs, radio tubes, tobacco, dental supplies, optical goods and bread. L.A. Skeoch, "Canada" in Resale Price Maintenance, supra note 28, at pp. 25-29.
59. Richard Zerbe, "The American Sugar Refinery Company, 1887-1914: The Story of a Monopoly," Journal of Law and Economics, vol. 12, 1969; Marvel and McCafferty, supra note 57.
60. Marvel and McCafferty, supra note 57.
61. Marvel and McCafferty, id.
62. J.R. Gould and L.E. Preston, "Resale Price Maintenance and Retail Outlets," Economica, vol. 32, 1965, p. 302.
63. Mathewson and Winter, supra note 18.
64. Frank Easterbrook, "Restricted Dealing is a Way to Compete," Regulation, January-February 1984, pp. 23-27. This rationale for price maintenance was originally developed in Lester G. Telser, "Why Should Manufacturers Want Fair Trade," Journal of Law and Economics, vol. 3, 1960, p. 86. In a significant extension of the dealer service argument, Marvel and McCafferty have argued that RPM enables manufacturers to obtain certification of the quality of their products from reputable dealers. The stocking of the product by such retailers signals that the product is consistent with their high quality reputations. Like the provision of presale information, this signal is subject to free riding by discount retailers. Resale price maintenance may prevent such free riding and make high quality products attractive to reputable retailers. Howard P. Marvel and Stephen McCafferty, "Rand Journal of Economics", vol. 15, 1984, p. 346.
65. Marvel and McCafferty, supra note 57, pp. 374-75.
66. Restrictive Trade Practices Commission, Report on an Inquiry into Loss-Leader Selling (Ottawa: Queen's Printer, 1955). For an overview of recent empirical studies of the various economic hypotheses respecting price maintenance, see Anderson and Khosla, supra note 29.



67. See e.g., Paul K. Gorecki and W.T. Standbury, The Objectives of Canadian Competition Policy (Montreal: Institute for Research on Public Policy, 1984). These authors state, "This particular restraint of trade [price maintenance] had a long history in Canada and has very little to recommend in its defence." (p. 127). See also Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing," Georgia Law Review, vol. 71, 1983.
68. F.M. Scherer, Industrial Market Performance and Economic Structure (Boston: Houghton Mifflin, 2nd ed., 1980), pp. 590-94, especially at note 103. But cf. Mathewson and Winter, supra note 18, and Marvel and McCafferty, supra note 57, who challenged this viewpoint.
69. 220 U.S. 373 (1911).
70. For discussion, see Scherer, supra note 68, at pp. 590-91.
71. For additional background, see Easterbrook, supra note 18, and R.D. Anderson and S.D. Khosla, "The Monsanto Case and the Evolution of RPM Policy in the U.S.," Canadian Competition Policy Record, vol. 5, no. 3, September 1984, pp. 9-16.
72. 433 U.S. 36 (1977).
73. 250 U.S. 300 (1919).
74. Phillip Areeda, "The State of the Law," Regulation, January-February 1984, pp. 19-22.
75. Brief of the U.S. Department of Justice, Monsanto Co. v. Spray-Rite Service Corp., No. 82-914, 1983. The brief cited a number of the economic arguments discussed above in Part III(B).
76. The Court stated: "It is of considerable importance that independent action by the manufacturer, and concerted action on non-price restrictions, be distinguished from price fixing agreements. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded." Monsanto Co. v. Spray-Rite Service Corp. (1984), 465 U.S. 752 (1984). This statement underscores the limitation of the U.S. prohibition of RPM to vertical price fixing agreements.

77. Business Electronics Corp. v. Sharp Electronic Corp..  
U.S. Supreme Court, May 1988.
78. Id., at p. 7.
79. See Stuart E. Benson, "Foreign and International  
Competition Law Developments, " Canadian Competition  
Policy Record, vol. 9, no. 1, March 1988, pp. 45-48.  
For background, see Anderson and Khosla, supra note 29.



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**"BUSINESS ENVIRONMENT TODAY" CONFERENCE ON  
INTERNATIONAL BUSINESS: A CANADIAN PERSPECTIVE**

NOTES FOR A DINNER ADDRESS

BY

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KINGSTON, NOVEMBER 9, 1988







I am pleased to have been invited to participate in this conference. The theme of this conference focuses on issues confronting business in Canada as well as labour and government in the face of expanding global markets. I hope my remarks this evening will contribute toward your examination of these issues.

Much of what I'll say will be about balance -- a matter of continuing interest to anyone who confronts, day by day, the issues of competition policy.

On that subject, I think of a story told about a former Canadian Prime Minister. He had grown weary of receiving position papers from economists in which the phrase "on the one hand" and "on the other hand" followed each other down the page in an endless procession of options, alternatives and hypothetical possibilities.

Sometimes I dream at night, he said, about an economist with only one hand.

Given that my talk is to be about balance, I think it only fair that something also be said about lawyers. The story is told about a lawyer who dies and goes to Heaven. He is met at the Pearly Gates with a large welcoming committee.

"It's not every day that a lawyer enters Paradise," he is told, "and even rarer that we receive a lawyer who's 189 years old."

"There must be some mistake!" replied the lawyer. "I'm not 189 years old, I'm only 62!" "No you're not," the committee replies: "We've checked into your files, and we've got your billable hours to prove it!"

The need to achieve a balanced approach in competition policy, one that protects competition without crippling the competitors has never been greater.

In Canada we've seen a literally unprecedented wave of mergers; we've seen the passage in June 1986 of a new competition law, and we've had over two years of experience applying that law. I want to tell you something about these Canadian developments.

But first I want to make the point that what's happening here is part of a much wider picture. Let me discuss this both in general terms and in terms of specific details.

Most western industrialized nations are enjoying a period of sustained economic growth. It has many roots. One of the most obvious is the lowering of trade barriers over the past quarter century as a result of the successful negotiations carried out during the Kennedy and Tokyo Rounds of GATT -- with more to come, we hope in the Uruguay Round.

All over the world the fences have been coming down, and the statistics show the result. Tariffs on the world trade of manufactured goods fell on average from 40 percent in 1947 to between 5 to 6 percent in 1987. Since the

Second World War, the volume of international trade has experienced an eight-fold increase. Canada has shared in that growth, with our 1987 exports accounting for 38 cents out of every dollar of our Gross Domestic Product.

Meanwhile, over recent years, we have seen a coalescing of nations and regions into a growing number of regional trading blocs: the European Economic Community (already closely-knit and heading by 1992 for even greater togetherness), the Australia-New Zealand Closer Economic Trade Relations Agreement and the Association of South-East Asian Nations. And, although it's not a subject fitting for a public servant to dwell on at this particular point, there presently is broad discussion about the possibility of another such bloc, here on this continent.

As the fences between markets have come down, we have seen another change -- the increasing development of global markets, served by world-scale corporations offering products and services worldwide.

Parallel with that development, we have seen an escalation in mergers, takeovers and general consolidations, not only in Canada and the U.S., but in Europe and elsewhere.

This increased merger activity is the result of many factors. Some economists suggest that as a result of last year's stock market crash, cash-rich companies are buying companies selling at bargain-basement prices. Others point to the government policies of privatization and regulatory

reform. Mergers and acquisitions are taking place as companies position themselves for more competitive operating environments. And, underlying these other two factors, economists cite the longer-term trend towards the globalization of certain markets. Through mergers and acquisitions, some corporations are acquiring the size and the reach they need to service larger markets, including, in some instances, world markets.

This isn't just a boom for bigger companies. Smaller companies have been able to specialize -- to realize economies of scale, and to carve out their own niches in foreign markets.

Nevertheless, the merger wave is the major phenomenon. Takeovers have reached record-breaking levels. In the first three quarters of this year, the total value of mergers and acquisitions in the United States exceeded \$200 billion (U.S.). This figure represents a 35 percent increase over the comparable period for 1987 and it does not include a number of the mega-mergers announced in recent weeks.

In Canada, too, takeovers continue at a relentless pace. In 1980, according to figures from my own Bureau, there were 414 takeovers in Canada. Last year there were 1 092. According to recent Harris-Bentley reports, the total value of major mergers in Canada in the first six months of this year was \$15 billion -- compared with \$19.3 billion in all twelve months of 1986. Once again, the



value in terms of Canadian assets of recently announced mergers of multinational corporations, particularly in the food sector, is not included in these figures.

The merger wave is happening in the setting of sustained economic growth. In 1987, Canada completed its sixth year of continuous economic expansion. We had a trade surplus of \$813 million. In 1986, Canada achieved the highest growth rate among the seven largest industrial nations.

What has happened internationally, through GATT and otherwise, has been the unfettering of competition, the reduction of restraints on trade, and the liberation of market forces. Indeed, the growing recognition of the benefits of a stronger interdependent global economy was evident at the Toronto Economic Summit in June 1988. The Economic Summit communiqué was, among other things, a statement of commitment to the building of a stronger, interdependent global economy. And it included a statement to pursue the removal of barriers and unnecessary controls that limit competition.

And we see, enlarged in many cases to international proportions, the classic challenge which has faced antitrust authorities at the national level -- the need for balance, the need to protect competition itself without stifling the competitors.

There are examples of these responses everywhere.

- France revised its competition laws at just about the same time that Canada did.
- The UK recently issued a White Paper on the subject of Britain's economic prospects in the new environment. An important element of the policies it expounded was the need to reform Britain's competition laws to take account of European and non-European competition.
- Italy is studying proposals to bring in the first merger laws in its history and, incidentally, is looking to Canada's law as a possible model.
- In June of this year the U.S. Department of Justice issued a draft version of their antitrust guidelines for international operations.
- Australia and New Zealand have signed trade agreements which will require revisions in their own antitrust legislation.
- Looking ahead to 1992, the EEC has issued a White Paper which takes specific note of the need to guard against anticompetitive practices becoming, in effect, a form of resurgent protectionism which would eventually fragment their common market. In addition, a new merger control regulation is being proposed in order to harmonize EEC merger review for mergers in excess of \$1 billion (E.C.U.) which involve operations which have less than 75 percent of their aggregate community-wide revenues within a single member state.

International organizations are also addressing the need for new agreements and institutions through which to co-operate on competition matters across national boundaries.

- In 1984, Canada and the U.S. signed a Memorandum of Understanding which outlines arrangements for notification and consultation between the two countries regarding the application of their respective antitrust laws, in order to avoid or moderate conflicts of interests and policies. And, as one might expect, the number of notifications under the M.O.U. has increased particularly as a result of the merger review process.
- In 1986, the OECD Restrictive Business Practices Committee issued recommendations to its member states calling for similar notification and consultation measures in the application of domestic antitrust legislation to problems which spread beyond national boundaries.

That is the setting, the context, for what follows in this talk -- a discussion of how is Canada responding to these challenges. That is the pertinent question.

The short answer, in my view, is that we're responding well.

We have a new Competition Act which meets the specific needs of Canada in the present situation.

You could say that the Competition Act came along at exactly the right time. It passed through Parliament just as the largest wave of takeovers in our history was

beginning. Not only was its timing right but the design of the legislation clearly conformed with greater reliance on enhancing competition and freer markets within an international arena. To ensure that the benefits of these initiatives accrued to all Canadians, a policy was required that would strike that balance which many other nations are now scrambling to achieve. We have such a policy and it finds its expression in the Competition Act.

The language of the Purpose Clause shows very clearly that the drafters of the Act understood the growing importance to Canada of foreign competition and global trade. Section 1.1 sets out that the purpose of the Competition Act is "to maintain and encourage competition in Canada." In so doing, the Act identifies a number of specific objectives, among them, the objective "to expand opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada."

Perhaps the most significant change brought about by the Competition Act, and the most pertinent to my remarks today, is the law as it applies to mergers.

One basic change the Act brought about was the decriminalization of merger review. Use of criminal merger provisions had failed in the past to check mergers harmful to competition, largely because of the burden of proof faced by the government. The new non-criminal reviewable merger provisions give us a workable and effective way to stop,

dissolve or restructure mergers that are likely to prevent or lessen competition substantially in Canada. Merger review can now be carried out effectively and responsibly.

In assessing the impact of mergers, the Act requires that we abandon tunnel vision -- it requires that we look at the question in a real world context. Let me itemize four aspects of that approach:

- First. We are not locked into strict quantitative criteria such as concentration ratios or market share. The Act requires us to consider a whole range of other, quote qualitative unquote factors. These include the existence of effective competition from foreign competitors actual or projected, and the existence of market entry barriers including tariff and non-tariff barriers to international trade.
- Second. We look not only at negative effects on competition, but also at gains in efficiency which may exceed and offset these effects.
- Third. The Act includes what we call a national treatment standard -- in simple terms: the law is applied to acquisitions in the same manner whether the transaction involves acquisitions by Canadian-based or foreign companies. This is consistent with the principles of antitrust law applied in other Western democracies.
- Fourth. The new Act takes specific note of the economic motivation for and the beneficial effects of



specialization agreements, which may be a viable alternative to a proposed merger.

This change is highly relevant to our current economic priorities. Specialization is, as we have seen, one of the key strategies that many Canadian companies may employ to survive and succeed in the expanding markets of liberalized trade. Under the old combines law, agreements between competing firms to specialize were suspect -- they might even have been judged to be criminal conspiracies. The fact that they might involve gains in efficiency was irrelevant. The law did not consider these benefits.

The new Act isn't blind. Specialization agreements can now be approved on the grounds that they produce efficiency gains that are greater than and offset any lessening of competition -- gains which can be established through the demonstration of net benefits to Canada in our international trade of goods and services.

Nor is the Act predicated on simplistic assumptions which get in the way of common sense and realistic solutions. For instance, the premise isn't that bigness is bad per se. Rather, the Act focuses on the abuse or potential abuse of market power, abuse that impairs the smooth running of a competitive economy. This is evident in both the merger provisions and the new abuse of dominance provisions which have replaced the criminal offence of monopoly.

So the focus is on the abuses of dominance and size. If the largest player on the block uses its size rather than the competitive quality of its products or services to squeeze out the competition, it can count on raising our concerns under the Act.

Our ability to reach sound, well-considered decisions derives first of all from having well-crafted legislation to work with. But it also grows out of a carefully-considered and real world approach to application of the law -- one that seeks to arrive at resolutions sensibly and efficiently -- with a minimum of unnecessary conflict and second-guessing. That is not a simple and easy objective to attain since we are often looking at prospective situations.

Essentially, this is what we call a compliance-oriented approach -- in plain English, an approach that gives businesses every reasonable opportunity to so arrange their business affairs that they avoid conflict with the Act. We keep the doors open to discussions and consultations with my office throughout this process. This is an approach that is flexible and therefore adaptable to a wide range of competition concerns. And finally, it is an approach that relies on access to the courts and the Tribunal to enforce the Act on a contested basis only when that course of action proves necessary to achieve the objectives of the Act.

There isn't time here to discuss all aspects of our compliance-oriented approach nor the full range of remedies available to resolve merger questions. These have been

discussed in a number of papers released from my office. Instead, let me mention some of the instruments which have been used frequently, together with some examples.

Two of the most direct ways in which we attempt to facilitate compliance with the merger law are the provision of advisory opinions on proposed mergers and the issuance of advance ruling certificates.

These instruments allow the parties to a merger to come to the Bureau of Competition Policy at the proposal stage, to learn in advance our opinion of its effects on competition. If the proposal is one that will not substantially lessen competition within the framework provided by section 74, an advance ruling certificate is issued which allows the merger to proceed with statutory comfort. If the proposal cannot meet this test, the parties may be provided with an advisory opinion telling them about either our present concerns or possible future concerns. However, the majority of requests for certificates have been granted. In fact, as of the end of October 1988, 86 certificates were requested of which 60 were granted and 12 were given advisory opinions. A good number of other advisory opinions were also issued to parties who had not sought certificates.

When we are faced with a merger that will likely prevent or lessen competition substantially in Canada, there are several routes we can follow to resolve our concerns short of litigation.

In some situations it may be appropriate to allow the merger to proceed unchallenged on the basis of undertakings to take specific action to remove or remedy our concerns. Restructuring of the proposed merger may be accomplished prior to the transaction closing date. We prefer this route to postclosing actions. For example, on Nabisco Brands Ltd.'s bid to acquire certain assets of the InterBake Food Division of Weston Foods Ltd., the parties agreed to a sale of a considerable portion of the assets to another company, Aliments Culinar Inc., to preserve competition in the marketplace. This restructuring occurred in conjunction with the closing of the remainder of the original merger.

In other circumstances, a resolution may be based on an agreement by the parties to take certain action after the deal is closed. An example here, is the Canada Safeway/Woodward acquisition in which Canada Safeway undertook to divest itself, within set time periods, of 12 supermarket stores to meet our concerns for competition in local markets.

In some merger situations, it will simply not be possible to adequately assess the competitive impact in advance. For these cases, the Act provides a specific solution. Instead of stifling a company's plans at birth when in fact they may not ultimately give rise to a substantial lessening of competition, the Act allows for a three-year period in

which we can monitor the merger's actual effect on competition. If in that time, we see that competition is being lessened substantially -- or will likely be -- we can then take steps to curb these negative effects. For example, in light of this instrument it was decided not to oppose Nova's acquisition of a significant interest in Polysar. We adopted the same approach to the acquisition by Dofasco of the Algoma Steel Corporation where the one market of particular concern for monitoring purposes involves hot-rolled steel products.

The uncertainty about the impact of a particular merger may be seen in the context of another recent case. In the purchase of Dome Petroleum by Amoco Canada, our concerns about the effect of competition in relation to the natural gas liquids market were balanced by several factors including the potential impact of international competition on the Canadian industry. This and other factors resulted in a decision to allow the merger to proceed without challenge at this time, with the understanding that monitoring in these areas of uncertain development would occur.

The Competition Act was passed just as the merger wave was beginning -- it's reached tidal wave force since then, and statistics from my Bureau reflect that.

Since June 1986 to the end of October 1988, counting only those cases which required more than two days of study, the Bureau has concluded its review of 256 merger transactions.



This number represents approximately 10 percent of all merger transactions in Canada. Of these 256, the great majority of transactions proceeded as originally proposed.

In 15 cases we indicated our intention to monitor closely some aspect of the transaction during the three-year period provided in the law. In three cases, the merger proceeded only after a preclosing restructuring of the transaction was agreed to which resolved our competition concerns. In four cases undertakings were entered into in which the parties were required to take certain remedial action after the closing of the transaction. In five other cases the parties abandoned the proposed merger in whole or in part as a result of my position. Four matters involved filings before the Competition Tribunal of which two are still sub judice.

What these numbers do not reflect is the effect of a growing awareness of merger laws by businesses and corporate counsel. I understand that a number of proposed merger transactions have been either stopped or restructured at the blueprint stage, without coming to my office, in the realization that these proposals were not consistent with the new standards of merger review under the Act.

In July 1987, the merger preclosing notification provisions in Part VIII of the Act were proclaimed in force. Subject to certain exceptions, they require notification to my office of proposed mergers that meet two basic thresholds:

- (1) the parties, together with their affiliates, must have total assets in Canada, or total annual Canadian revenues from sales in, from, or into Canada of over \$400 million; and
- (2) the value of the assets in Canada to be acquired, or the gross revenues flowing from them, must exceed \$35 million.

There are a number of nuances and exceptions which I won't attempt to cover this evening. I'll refer you to the Act for specific questions you may have.

In the 15 months since the provisions have been in force, we have received 118 formal notifications. That is well in excess of original estimates. Moreover, those proposed mergers which have received advance ruling certificates are not subject to compulsory notification.

These figures simply illustrate the volume of large-scale mergers that have been the subject of examination in the Bureau of Competition Policy.

A final thought before I close: the challenge facing Canada and other industrialized countries at this time is adaptation to dynamic global changes.

The introduction, at precisely the right time, of a new competition policy expressed by state-of-the-art competition law is, in my view, one of the quieter but more significant success stories in the saga of Canada's adaptation. In this area we have the advantage of not having to play catch-up

hockey -- we have a headstart -- as demonstrated by the fact that at the moment, governments of a number of OECD nations are studying aspects of the Canadian legislation as a possible model for their own.

The good news from the economic front is that competition is being protected effectively, and so concurrently is Canada's ability to compete.



# Speech



Consumer and  
Corporate Affairs Canada

Consommation  
et Corporations Canada

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## THE CANADIAN COMPETITION ACT

NOTES FOR AN ADDRESS  
TO THE  
CONSEIL DE L'INDUSTRIE LAITIÈRE  
DU QUÉBEC

BY  
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CONSUMER AND CORPORATE AFFAIRS CANADA  
QUÉBEC CITY, NOVEMBER 1, 1988







## INTRODUCTION

I am pleased to have this opportunity to speak to you about Canada's new Competition Act. The role of competition policy as a means of ensuring that Canadian businesses and markets are competitive is increasingly being recognized. In particular, with the globalization of the world economy and greater trade liberalization, competition policy has taken on added significance in Canada.

Even though the dairy industry is highly regulated in Quebec, there are still competition issues which arise in your industry. I hope that my remarks today will help you to better understand the role of competition law in your industry.

Next year marks the 100th anniversary of the passage of Canada's original antitrust legislation. And although there have been numerous changes since that time, probably the most significant of these have occurred during the past two years. These changes can be viewed as falling into two general categories. First, there are those changes which can be described as statutory or framework changes. These are the result of the introduction and passage of the new Competition Act in June, 1986. Second, there has been a change in direction, a renewed compliance initiative, in regard to how the Act is applied and administered. I would like to organize my remarks today around these two significant developments in competition law in Canada.

## STATUTORY OR FRAMEWORK CHANGES

### **Reform Process**

The Competition Act is the culmination of a reform process that began in 1966 when the government of the day requested the Economic Council of Canada to produce a report on competition policy. The subsequent report not only resulted in the first stage amendments to the Combines Investigation Act in 1976 but also generated 10 years of further debate and a number of unsuccessful attempts for further reform. Finally, after much consultation with the business community and the economic and legal professions, the Competition Act was enacted in 1986.

The most important and far-reaching reform brought about by this legislation was the decriminalization of the merger and monopoly law in Canada. The previous merger provisions under the Combines Investigation Act contained criminal sanctions which had proved to be totally ineffective. Indeed, in the 75-year history of the criminal merger law, only nine cases were brought before the courts. None of these actions was successfully prosecuted on a contested basis by the Crown. Seven cases resulted in acquittal and two cases, not contested, resulted in guilty pleas.

The change to a non-criminal law setting was necessary to allow for the consideration of a wide variety of economic factors when analyzing the competitive impact of any

merger. It also has relieved the Crown of the exceptionally difficult criminal law burden of proof and allows for more flexibility in finding appropriate remedies.

Coincident with the passage of the Competition Act, the Competition Tribunal was created to deal with mergers, monopolies -- now reviewed as abuse of dominant position -- and other reviewable matters. The Act added delivered pricing and specialization agreements to the variety of matters that may be brought before the Tribunal. The legislation also placed banks and Crown corporations under the Act. Finally, the investigatory powers of the Director of Investigation and Research, the official having responsibility for the administration and enforcement of the Act, were revised to conform to Canada's Charter of Rights and Freedoms.

The business activities covered by the Competition Act can be placed in the following categories:

- i) mergers,
- ii) restrictive trade practices,
- iii) agreements to restrict competition,
- iv) pricing practices, and
- v) misleading advertising and deceptive marketing practices.

In addition, of particular interest I am sure to your Association, the Act empowers the Director to make representations with respect to competition to federal boards and commissions and, on consent, to provincial boards and commissions.

As I indicated earlier, the provisions relating to the first two categories, mergers and restrictive trade practices, are non-criminal and may, on application to the Competition Tribunal, be subject to a remedial order. These non-criminal practices include abuse of dominant position, tied selling, market restriction, refusal to deal, and exclusive dealing.

The remaining three categories of activities fall within the criminal provisions of the Act. Agreements to restrict competition include conspiracies to fix prices and allocate markets, bid-rigging and certain agreements among banks. Illegal pricing practices include price maintenance, predatory pricing and price discrimination. The final category of criminal offences includes false and misleading advertising and other deceptive marketing practices.

### **Institutional Setting**

For those of you not familiar with the Competition Act, let me take a moment to briefly detail how it is administered.

The overall objective of the Competition Act is clearly set out in the purpose clause, which provides the general framework for the entire legislation. The purpose of the Act is to maintain and encourage competition in the Canadian economy so as to:

- promote the efficiency and adaptability of the Canadian economy;



- expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;
- ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.

The Director of Investigation and Research is appointed by the Governor in Council under the Act and has responsibility for administering and enforcing the Act to achieve the stated purpose and objectives of the Act.

The Director's principal role is to conduct examinations and inquiries in cases which raise competition concerns under the Act. There are three ways in which an inquiry may be initiated under the Act. Most frequently, the Director commences an inquiry on his own initiative when he has reason to believe that an offence has been or is about to be committed, that a person has contravened or failed to comply with an order under the Act or that there are grounds to seek an order of the Competition Tribunal. Many inquiries result from complaints lodged by businesses about suppliers or competitors. An inquiry must also be commenced on the application of six residents of Canada, or if the Minister of Consumer and Corporate Affairs so directs.

Once the Director has initiated an inquiry he has extensive investigatory powers and discretion as to the appropriate course of action. One of the tools available to the Director is to apply to the courts for a warrant authorizing the search of premises and the seizure of evidence pertaining to the inquiry. The Director may also apply to a court for subpoenas requiring a person to give evidence on oath, to produce records, or to make written returns of information.

Only the Director has the statutory authority to bring non-criminal cases to the Competition Tribunal for adjudication. For criminal cases, the Director refers the evidence to the Attorney General of Canada who then may at his discretion bring the case before the courts.

Generally, the jurisprudence has held that activities specifically authorized by statute or effectively regulated by a public agency will not be found to be in contravention of the Competition Act. This is known as the "regulated conduct defence" and it should be viewed as such and not as a blanket exemption from the Act. It is a defence which is activity- or conduct-specific which should not be taken as a defence of all types of behaviour in the industry. In light of the new non-criminal provisions of the Act, the question is raised whether the application of the regulated conduct defence differs in this non-criminal context.

Even in the case of regulated industries, the Director has an interest and a role to play. The Act provides for the Director to make representations respecting competition to federal and provincial regulatory boards and commissions. In the case of federal boards, he has a statutory right to intervene; in the case of provincial boards, he may do so on consent of the board. This, I am sure, is of particular interest to you and your Association. As you can appreciate, such interventions can play an important role, given the substantial impact which the decisions of such regulatory bodies can have on competition.

As you may know, the Director recently intervened before the Canadian Import Tribunal in its examination of whether Hyundai was causing injury by dumping cars in Canada. We argued that Hyundai's practices were not causing domestic producers material injury. The Tribunal made such a finding notwithstanding arguments to the contrary by Ford and General Motors.

#### RENEWED COMPLIANCE INITIATIVE

I would now like to turn my attention to the second significant development in competition law enforcement that I spoke of earlier. This development involves a new direction and a new policy initiative that are being applied to encourage an increase in overall compliance with the Act. In this regard I would like to touch on three important points. First, the overall enforcement approach

that the Bureau is following. Second, the major priorities we have identified. Finally, our increased use of consent orders of prohibition and other alternative case resolution techniques.

### **Enforcement Approach**

The enforcement approach chosen can be very important in determining the overall effectiveness of competition legislation. The Bureau has adopted a compliance-oriented approach as the means to best achieve the goals of maintaining and encouraging competition in the most efficient and economical manner.

This approach is designed to prevent violations of the Act by providing a sound understanding of the Act and encouraging a positive attitude to compliance with its provisions and, consequently, to reduce the need for lengthy and expensive inquiries and legal proceedings. In this regard, we have developed an extensive information program involving speeches, seminars, information booths at trade shows, publications including Information Bulletins, the Director's Annual Report, press releases, and background information on the resolution of specific cases.

In addition, to assist business persons who wish to avoid coming into conflict with the Act, we are continuing the Director's Program of Advisory Opinions whereby we provide opinions on whether implementation of a proposed business plan or practice would give the Director grounds to

initiate an inquiry under the Act. The Director may also initiate an information contact for the purpose of facilitating compliance with the Act if he is of the opinion that a person may be unaware of a particular provision of the Act.

Finally, we are making greater use of those case resolution techniques which do not involve contested proceedings before the courts or the Tribunal. These alternative case resolution instruments include investigative visits, undertakings, monitoring, and consent orders of prohibition.

The compliance approach is broad and flexible enough to provide businesses with every reasonable opportunity to structure their affairs within the limits of the law. This in turn allows us to address matters using the most effective means and to focus our resources on cases of greater potential economic significance, consumer benefit, or deterrent effect.

Our compliance policy should not be misinterpreted. When contested proceedings prove necessary, the Director is neither reluctant to refer cases to the Attorney General nor to file applications before the Tribunal for remedial orders when these responses are deemed appropriate in circumstances of non-compliance. Indeed our known willingness to litigate is an essential underpinning to the success of the compliance-oriented approach.



This leads me directly into my next point which deals with those competition issues that the Bureau considers to be of the highest priority.

### **Priorities**

Clearly the introduction of an effective merger law in 1986 and the provisions requiring pre-notification of large mergers in 1987 has assured that the merger review process has become one of the Bureau's major priorities. To date, the examination of approximately 256 transactions has been completed, and this figure includes only those requiring more than two days of review. Of these, seven led to a restructuring in response to the Director's concerns, 15 have proceeded subject only to further monitoring by the Director, five proposed mergers were abandoned because of the competition concerns that came to light and four led to applications to the Competition Tribunal.

The first contested case involved two acquisitions in the waste rendering business by Alex Couture Inc./Sanimal Industries Inc. which is based here in Québec City. The Couture case has led to a constitutional challenge and the matter is still before the courts.

The major priorities under the criminal provisions are price-fixing and bid-rigging. These have been identified as the most serious of economic crimes and their enforcement is the cornerstone of Canada's competition laws. The Director has reiterated on numerous occasions his intention to deal

firmly with businesses and individuals who engage in such practices.

The Director has recognized the seriousness of these crimes given that Parliament raised the maximum fine in conspiracy cases tenfold. Adopting a maximum fine of \$10 million was a clear signal to the business community that Parliament considers conspiracy as a serious crime. In addition to the fine is the possibility of a jail term of up to five years.

In a recent judgment involving bid-rigging on glazed glass in British Columbia, Mr. Justice Lander described the practice as "a fraud" which "unnecessarily and dishonestly increases the cost to an owner/builder." Perhaps you are familiar with the Bureau's most recent bid-rigging prosecution, which involved the supply of business forms in Saskatchewan. In this case the judge, after levying a record fine of \$1.6 million against four firms, noted that the bid-rigging directly affected the pocketbooks of all citizens in the province. In a similar case in Nova Scotia involving two of the same firms, the judge noted that "it is the taxpayer who suffers from practices such as these and punishment must be severe."

The Director is prepared to continue to seek more substantial fines in cases involving bid-rigging and conspiracy. We are also giving serious consideration to the U.S. approach of prosecuting individuals when clear criminal conduct is present.

In that country, an increasing number of individuals are being charged and sentenced to substantial prison terms for antitrust violations. In the last 10 years the average jail sentence in the U.S. in such cases has risen 30 percent. During the last year, individuals have received terms of imprisonment of at least six months on seven separate occasions. In addition, the U.S. has recently adopted new Sentencing Guidelines. Unless extenuating circumstances apply, the U.S. Guidelines, in cases involving conspiracy, require judges to impose jail terms for individuals of a minimum of four months. Whether such an approach should be adopted in Canada has not yet been determined. However, the American experience merits serious consideration and is at present being carefully studied.

Another facet of enforcement strategy that is extensively used in the U.S. is the granting of immunity from prosecution for individuals in return for their complete cooperation as witnesses. The Bureau is presently exploring the merits of this approach as an effective enforcement tool in conjunction with the Department of Justice. In the past, in rare instances, immunity from prosecution has been granted, but the Bureau is now exploring with the Department of Justice the wider use of this tool. This includes the advisability of establishing well-defined guidelines for the use of immunity in the future. Of course, we are aware of the implications of this procedure and of the need to exercise its application with caution and care. Too liberal

an application of an immunity program could undermine the general enforcement strategy.

A further area of priority includes reviewable trade practices, particularly the new abuse of dominance provisions. These provisions replace the former criminal offence of monopoly. The law is drafted in such a way that it is the anti-competitive conduct of the dominant firm, and not its size, that is important. Such conduct becomes an issue when the firm uses its market power to entrench or extend its dominant position.

To date, the Director has not had an opportunity to take a reviewable trade practice before the Competition Tribunal for contested adjudication. Although there is little doubt more of these matters will be taken forward in the future, the effectiveness of the Act cannot be measured only by the number of cases that come before the Tribunal. Indeed, the non-criminal nature of these provisions affords greater flexibility to resolve matters without taking the litigious route.

For instance, the majority of refusal to deal cases that raise an issue under the Act are resolved when the supplier is informed of the fact. By way of an example, my Branch recently dealt with a case in the Toronto area in which the manufacturers of a building material product refused to supply a potential new retailer. This refusal was severely limiting the retailer's ability to effectively enter and compete with the established firms in the market.

Each of the manufacturers agreed to supply the new entrant after it was brought to their attention by Bureau staff that their continued refusal would raise an issue under section 47 of the Competition Act. The result was the expeditious and effective resolution of the problem which stimulated competition at the retail level of the market. Litigation could not have generated a more desirable outcome than this.

As a measure of our commitment to develop the reviewable practices provisions of the law, our recent reorganization of the Bureau created divisions to deal exclusively with these practices.

#### **Prohibition Orders and Other Case Resolution Techniques**

In many prosecutions under the Competition Act the courts are asked to grant an order prohibiting continuation of the conduct in question. This is in addition to the fine levied. These orders are directed against the convicted corporations, the officers and directors of these companies and often against specified employees such as sales managers. Some of the orders include provisions for monitoring compliance with the order by the Director. In the Business Forms case, the court ordered the four convicted accused to publish an account of the Order in the Globe and Mail's Report on Business and in two trade magazines. This Order was designed to advise the public generally and purchasers particularly of the existence of



the bid-rigging scheme. By making purchasers aware of such conduct, and by making other firms aware of the potential adverse publicity, it is hoped that this will serve as a major deterrent to firms contemplating similar activities.

In some cases it may be appropriate to resolve a case by means of a consent prohibition order as an alternative to a contested prosecution. For example, last winter major cases involving agreements by two county law associations in Ontario to establish minimum tariffs were resolved in this way. The orders provided an immediate and effective remedy and avoided lengthy court proceedings.

In other cases, we are relying on investigative visits, and undertakings to refrain from specific activities, when appropriate, as alternative ways to obtain and assure compliance with the law.

#### CONCLUDING REMARKS

In summary, although the reform process has been long and arduous, the result is a more effective statute. But the changes in legislation reveal only a part of the changes that the Bureau has undergone during the past two years. The new compliance initiatives have allowed us to focus our efforts more selectively on the most important cases. In addition, the use of alternative case resolution techniques and a more vigorous pursuit of the most serious cases are contributing to an effective application of the Competition Act.

Canada's new Competition Act is very different from the first competition laws passed nearly 100 years ago. It is a dynamic and flexible statute that will hopefully help Canada face the changes in the world economy in the coming years.

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## COMPETITION LAW AND FREE TRADE

### THE CANADIAN ADAPTATION

NOTES FOR AN ADDRESS

TO THE

BRITISH ASSOCIATION FOR CANADIAN STUDIES SEMINAR

"BEYOND 1992: THE SINGLE MARKETS OF NORTH AMERICA  
AND EUROPE"

BY

CALVIN S. GOLDMAN, Q.C.

DIRECTOR OF INVESTIGATION AND RESEARCH

BUREAU OF COMPETITION POLICY

CANADIAN HIGH COMMISSION

LONDON, ENGLAND

MARCH 9, 1989





I'm here today to talk about a specific aspect of the challenge of adaptation presented by today's economic environment -- the protection of competition itself in an environment of freer trade.

This challenge has been high on the agenda in Canada for some time, and we're confident that our adaptation will be flexible, realistic and effective. I want to tell you about the reasons for this optimism.

Basically, any discussion of this kind boils down to an examination of the relevance of competition law to a changed environment -- and that is where I will begin. The good news from Canada is that we are prepared. In this respect, our adaptation took place in advance.

I refer to the passage in Canada of our new Competition Act, in June, 1986. The timing was advantageous. We were in the early stages of what has turned out to be one of the longest, uninterrupted periods of economic growth in our history; the Act cleared Parliament just as one of the largest wave of takeovers in our history was beginning to break.

As it turned out, the Act was passed just 2½ years before the Canada-United States Free Trade Agreement came into effect.

On the basis of our experience since then, it is my view that the new Act measures up -- it is the legislative instrument we need for this period and these conditions.



This is modern antitrust law drafted for a world of falling tariff barriers and increased global trade.

All over the world the fences have been coming down, and the statistics show the result. Tariffs on the world trade of manufactured goods fell on average from 40 percent in 1947 to between 5 to 6 percent in 1987. Since the Second World War, the volume of international trade has experienced an eight-fold increase. Canada has shared in that growth, with our 1987 exports accounting for 38 cents out of every dollar of our Gross Domestic Product.

Meanwhile, in recent years, we have seen a coalescing of nations and regions into a growing number of regional trading blocs: the European Economic Community (already closely-knit and heading by 1992 for even greater togetherness), the Australia-New Zealand Closer Economic Trade Relation's Agreement and the Association of South-East Asian Nations. And, in North America: the Canada-United States Free Trade Agreement.

As the fences have come down, we have seen the increasing development of global markets, served by world-scale corporations offering products and services worldwide.

And this has been accompanied by an escalation in mergers, takeovers and general consolidations, not only in Canada and the U.S., but in Europe and elsewhere.

Takeovers have reached record-breaking levels. In the first three quarters of 1988, the total value of mergers and acquisitions in the United States exceeded \$200 billion (U.S.). This figure represents a 35 percent increase over the comparable period for 1987, and it does not include a number of the mega-mergers announced in the latter part of 1988.

In Canada, takeovers are also continuing to occur. In 1980, according to figures from my own Bureau, there were 414 takeovers in Canada. In 1987 there were 1,092. According to Harris-Bentley reports, the total value of major mergers in Canada in the first six months of 1988 was \$15 billion -- compared to \$19.3 billion in all twelve months of 1986. And since that period, the pace of merger activity in Canada has continued with full force.

The merger wave is happening in the setting of sustained economic growth. In 1987, Canada completed its sixth year of continuous economic expansion. We had a trade surplus of \$813 million. In 1986, Canada achieved the highest growth rate among the seven largest industrial nations.

What has happened internationally, through GATT and otherwise, has been the unfettering of competition, the reduction of restraints on trade and the liberation of market forces. Indeed, the growing recognition of the benefits of a stronger interdependent global economy was

evident at the Toronto Economic Summit in June 1988. The Economic Summit communiqué was, among other things, a statement of commitment to the building of a stronger, interdependent global economy. And it included a statement to pursue the removal of barriers and unnecessary controls that limit competition.

And we see, enlarged in many cases to international proportions, the classic challenge which has faced antitrust authorities at the national level -- the need for balance, the need to protect competition itself without stifling competitors.

The design objective in the drafting of the Competition Act was in one word, balance. The legislators set out to write a law that would effectively discourage and prevent practices which harm competition. But they also recognized the need -- never more important than in this period of our history -- to do so without placing crippling handicaps on Canadian industry in relation to foreign competition.

These specifications are met faithfully throughout the Act. The evidence can be found as early as the purpose clause in section 1.1 which spells out the *raison d'être* for the legislation. This clause says that our mandate is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy. A specific objective in that mandate is, and I quote "to expand opportunities for Canadian participation in

world markets, while at the same time recognizing the role of foreign competition in Canada."

The Act also takes an approach to mergers that reflects this sensitivity.

Under our old Combines Investigation Act, mergers, acquisitions and monopoly were addressed in the context of criminal law. There were serious practical problems with that approach. In particular, the statutory test and the burden of proof required for conviction under criminal law standards were so onerous that the government prosecutor's role was a nearly impossible task. In the 76 years prior to the passage of the Competition Act, there was just one conviction for monopoly. Nine merger cases had been brought before the courts during that time. None was successfully contested.

Under the new Act, mergers, acquisitions and the newly enacted abuse of dominant position are now matters of administrative law that are adjudicated, not by the courts, but by a quasi-judicial body known as the Competition Tribunal. This does not involve the criminal process or the criminal burden of proof. The question on which the Tribunal focuses is the one that matters most in this field: does this prevent or lessen competition substantially?

With this approach -- which includes a requirement for advance notification of mergers which exceed certain thresholds -- we have a workable instrument with which to pre-

empt, dissolve or restructure mergers that prevent or lessen competition substantially in Canada.

The old legislation compelled us to take a narrow, tunnel-visioned view of the merger under review -- a focus exclusively directed on negative impacts amounting to public detriment. The new Act compels us to look at both sides of the ledger.

Here are some examples of what I mean:

1. In assessing the impact of a merger on competition we are required to go beyond number-crunching -- beyond calculating only market share for instance, or concentration ratios. We must weigh many other elements -- including the factor of foreign competition, actual or likely; the presence or absence of tariff or non-tariff barriers to international trade; the availability of acceptable substitutes for the products in question, and so on.
2. The merger law provides for the balance sheet to consider not only the negative effects on competition -- but also the gains in efficiency which will exceed and offset those negative effects -- particularly where those gains will produce a net benefit for the economy by way of a significant increase in the real value of exports from Canada or a significant substitution of domestic product for imports.
3. This characteristic is also important in its relationship to another feature of the Act -- the provisions relating to specialization agreements.



Specialization agreements are particularly important to Canada whose manufacturing sector contains a large number of small-scale plants. They obviously figure prominently in any strategy for adapting to wider markets under GATT. And they may play an important part in gearing up for Canada-US Free Trade. Yet, under our old, pre-1986 legislation, companies contemplating an arrangement of this kind faced a powerful deterrent -- specialization agreements could be construed as violations -- perhaps even as criminal conspiracies.

Under the new Act, two companies that want to specialize in the production of an article or service can apply to the Competition Tribunal for prior registration -- they can get a decision up front on its acceptability. If the Tribunal finds that the agreement will likely produce gains in efficiency that outweigh the negative effects on competition, the Tribunal may give the agreement the green light. The registration is on the public record.

4. The Act also moves us away from simplistic assumptions which may get in the way of reasonable solutions. For instance, there is no assumption, explicit or unspoken that "big" is, axiomatically, "bad". Instead the focus is on the uses to which that stature is put -- whether or not it is used or could be used to stifle competition. This approach characterizes the merger sections of the law and also the new provisions covering abuse of dominance which replace the

old criminal offence of monopoly. In this regard, we focus not on size alone, but on whether the conduct amounts to a practice of anticompetitive acts which is substantially lessening competition.

Another feature of the Act is that it allows us to apply the law efficiently -- we can employ procedures that enable us to reach well-considered decisions with a minimum of unnecessary conflict and second-guessing.

We take what I call a "compliance-oriented" approach. Or to put it another way: we seek to avoid unnecessary collisions rather than to untangle the wreckage afterwards.

The process is designed to give businesses every reasonable opportunity to see the possibility of conflict with the law up front and to avoid it if they so choose. I won't go into great detail about this except to say that we have a variety of instruments at our disposal. Parties planning a merger can come to the Bureau in advance requesting our assessment of the likely impacts on competition. If it is determined that no competition issue arises in accordance with the standard set forth in section 102 of the Act, then an Advance Ruling Certificate is issued. This in effect allows the merger to go ahead with "statutory comfort" -- which means parties can be assured they won't wind up in a contested proceeding before the Tribunal if the merger is consummated as proposed within a year after the issuance of the certificate.

And there are other instruments we can use to address competition concerns under the Act short of resorting to contested proceedings before the Tribunal.

In this regard our preference has been to "fix-it-first," in other words to remove our concerns for competition before the transaction is in fact closed. For those transactions in which remedial action will not be possible before the transaction is closed, we may proceed to the Tribunal on the basis of an application for an order on consent approving the resolution arrived at with the parties. There are also some instances where we may allow a merger about which we have concerns, to proceed without immediate challenge, but subject to an undertaking by the parties involved to take specific action by a specified date to deal with these concerns -- for instance by a partial divestiture of some component or other restructuring. Such undertakings are generally backed up by a consent to a Tribunal order which will be sought if the undertaking is not fulfilled.

In some situations, as you can imagine, it is extremely difficult to predict the impact of a merger on competition. In those cases, instead of stifling the transaction at birth, the Act allows for a three-year period in which we can monitor the actual effects on competition. In that time, if negative impacts emerge, we can assess them and take steps to curb them.

The focal point of our merger review process is the making of decisions which are fully informed. As a matter of policy we enlist the aid of industry and other outside experts. We seek information from many sources to ensure that we arrive at an accurate, real-world assessment of the likely effects of a merger.

This applies not only to possible challenges before the Tribunal but to all decisions and resolutions. At the Bureau the rule is that any matter coming to my desk must be thoroughly and realistically analyzed first. It must be accompanied by all the information needed to understand the ramifications of the proposed action. My emphasis, in short, is on making properly informed decisions, and more often than not, this means obtaining relevant input from the industry on the practical aspects of the merger.

Although our general approach aims at prevention rather than cure, wherever possible, and at making properly informed decisions, you should appreciate that success in this mode depends on the willingness of business and their counsel to sit down at the table with us and give us the "straight goods." If it becomes evident that someone is trying to run the clock or otherwise avoid the merger or pre-notification provisions of the Act, rest assured we will not hesitate to seek an immediate and appropriate remedial order from the Competition Tribunal.

The proof of the law's effectiveness is on the record. From June 1986 to mid-February 1989, we have completed our review of 321 mergers. That represents approximately 10 percent of the mergers that occurred in Canada. Of that number, 287 posed no problem under the Act; eighteen went into the monitoring mode, nine were concluded with restructuring, seven were voluntarily abandoned by the parties in whole or in part as a result of the position we took. It should also be noted that four merger applications have gone to the Tribunal for consideration -- and we have recently announced an intention to file a further application before the Tribunal on another.

Let me give you a few additional statistics that you may find of interest:

1) First, some statistics on pre-notification.

Between July 15, 1987, when the notifiable transaction provisions came into force, to mid-February 1989, we have reviewed 150 pre-notification filings. That is a great number of very large transactions considering that the first notification threshold is \$400 million in assets in Canada or in sales revenues in, from or into Canada.

2) Second, some statistics on Advance Ruling Certificates. As of mid-February 1989, we have received 113 requests for ARCs. Of those requests, my office has issued 83 certificates, 13 have resulted



in the issuance of an advisory opinion in lieu of an ARC, while five are still under review. In the remaining cases either the transaction was abandoned following the request for an ARC, or the parties were given a negative response and did not pursue the matter.

- 3) I should also add that as of mid-February 1989, more merger matters have been addressed through the issuance of ARCs (83) than through advisory opinions (45) under the program of compliance.

An important factor not reflected in these numbers is the effect of a growing awareness of merger laws by businesses and corporate counsel. I understand that a number of proposed merger transactions have been either stopped or restructured at the blueprint stage, without coming to my office, in the realization that these proposals were not consistent with the new standards of merger review under the Act.

In short, Canada's Competition Act and our compliance-oriented approach offer a broad range of flexible instruments which enable us to address competition problems in a realistic and effective fashion.

And, in all significant respects we have a law that fits and should work within the setting of the Canada-US Free Trade Agreement.

Free Trade doesn't eliminate or even decrease the need for competition law. It makes it as necessary as ever. Why? There are three basic reasons.

First, because the need to discourage anticompetitive behaviour doesn't end with free trade -- there are no tariffs against temptation.

Second, because anticompetitive behaviour allowed to run rampant would quickly cancel out the gains we make in free trade.

Third, because even in the great trading nation that Canada is, a significant share of the transactions that take place each day have nothing to do with international trade. Tariffs or no tariffs, some companies will continue to be insulated from foreign competition by geography, transportation costs and other barriers. In this setting, competition needs the protection of the law.

There are other reasons why we can look with confidence to a smooth adaptation.

One is the degree of cooperation that already exists in competition matters between the two parties to the agreement.

Long before Free Trade, Canada and the U.S. formally recognized the need to set up machinery for regular consultation on the application of our national antitrust laws. We signed a Memorandum of Understanding on this subject as far back as 1959, and updated it most recently in 1984.

Also, it should be noted that competition law in Canada and the United States has been getting more similar over the years -- and with the passage of our new Act, the differences have narrowed still further. Our treatment of mergers is a case in point. Both countries decide whether or not mergers are Good Things or Bad Things on the basis of their effect on competition -- both go beyond simple quantitative analysis in their assessment of the pros and cons of mergers. In short, on the important merger principles we are similar or converging. And the differences that remain are not likely to cause significant distortions of trade.

One stated goal of the Free Trade Agreement is the improvement of the current system governing transborder pricing practices. The Agreement provides for the creation of a Working Group which will look at the possible development of a substitute regime to replace existing trade remedy laws within the next five to seven years. In this context, the use of domestic competition laws to deal with anticompetitive pricing practices in transborder trade, as an alternative to existing antidumping laws, may deserve further attention. I would note that the member states of the EEC do not apply independent national antidumping laws against other member states.

Another question we frequently hear is about Canadian approval of foreign acquisitions. Two agencies and fields of interest are involved here and it's useful to keep that in mind.

Investment Canada reviews foreign acquisitions of Canadian businesses above specific levels. These thresholds are being raised gradually for U.S. investors. By 1992, except for the cultural industries, and the oil, gas and uranium sectors, the kick-in level for review of direct U.S. acquisitions will rise to \$150 million. For indirect U.S. acquisitions, the threshold will be lifted completely by the beginning of 1992. These changes will not influence the Investment Canada review of investment from other countries.

Furthermore, Investment Canada, which is concerned with broader net benefits to Canada, is not bound by our opinion on the competition factor. Similarly, my office is not bound by an Investment Canada decision. The merger test outlined in section 92 of the Competition Act applies -- even if the acquisition has been approved by Investment Canada. The Competition Act applies to mergers of all sizes and in all sectors of the Canadian economy.

It is also important to note that even if an acquisition is not subject to the compulsory pre-notification thresholds under the Competition Act, it may still be reviewed under the substantive merger provisions of the Act.

Although our new Act gives us a good start on adaptation, there are still interesting questions we will have to deal with as we move ahead.

For example, one occasionally hears the question of market definition raised. Specifically, some observers ask if the reduction of market barriers under the Free Trade Agreement is causing a re-examination of the concept of market definition. My short answer to this is that I do not perceive the immediate need for such a re-examination. At the same time, I expect that the qualitative factors found in section 93, dealing with barriers to entry and foreign competition, are likely to be more significant in such merger assessments. In addition, I anticipate that parties will more often present arguments about the gains in efficiency likely to flow from a proposed merger -- indeed, these kinds of submissions are already being made.

I've said we are confident about our ability to protect competition in the setting of Canada-US Free Trade. I've said that we have a head start in the form of the Competition Act. There is another, more basic reason for my confidence and I want to close with that.

I am referring to a basic compatibility of goals. Those who seek to remove trade barriers between nations and those who seek to protect competition within nations are allies in the same basic cause. And philosophically, there is a strong family resemblance between the objectives of the Canada-US Free Trade Agreement and Canada's Competition Act.



Both are concerned with the removal of artificial fences and the liberalization of market forces. Both see increased competition as a force friendly to the consumer, and conducive to economic growth. Both have, as a fundamental aim, the improvement of industrial efficiency and productivity and a more rational allocation of resources.

And both, I believe, should succeed in their goals.

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NOTES FOR AN ADDRESS  
TO  
THE CANADIAN EXPORTERS' ASSOCIATION  
(WEST COAST CHAPTER)  
AND  
THE VANCOUVER BOARD OF TRADE  
BY  
WAYNE D. CRITCHLEY  
DEPUTY DIRECTOR OF INVESTIGATION AND RESEARCH  
(RESOURCES AND MANUFACTURING)  
VANCOUVER, APRIL 18, 1989





First let me observe that 1989 marks two anniversaries in antitrust law. One hundred years ago, when Vancouver was a town of 18,000, Canada's Parliament passed the first legislation to protect competition -- one year ahead of the Sherman Act in the United States. And in June 1989, we will mark the third anniversary of the proclamation of the Competition Act.

Three years is not as spectacular as one hundred. But a good case can be made that of these two anniversaries, the second is the more significant.

The Competition Act is a remarkable instrument which has already played an important part in influencing the economic environment of Canada. Coming into force at a time when many countries are updating their own legislation, it has attracted attention in Europe and elsewhere as a model of modern antitrust law.

In this talk I want to tell you about the Act -- what it is supposed to do and how, and to give you some examples of its applications. Given the time limits of a meeting of this kind, this will have to be a fast-forward view of the Act and I will deal with general principles rather than fine detail.

In passing this law, the Canadian Parliament had three main goals -- three areas of improvement -- in mind: Effectiveness, balance, and a shift from cure to prevention. Let us look a little closer at how these gains were realized.



First, Effectiveness. This country needed, most basically, antitrust law that worked. In many important respects we did not have that.

There were various reasons. The single most important was that under the old legislation, most forms of anti-competitive behaviour were prosecuted under criminal law. Under criminal law you must prove the case beyond a reasonable doubt. For these kind of offences, this made it almost impossible to succeed in a prosecution. In three quarters of a century, for instance, there was not one successful contested conviction for an anticompetitive merger, and just one for monopoly.

Not surprisingly, these provisions of the law were found wanting. The onerous burden of proof against mergers and monopolies was clearly too high. At the same time, the criminal sanction was recognized as too heavy-handed a tool to regulate this type of business behaviour.

Even in areas such as price-fixing conspiracies, where the success rate was higher, the painfulness of fines had diminished over the years, along with the value of the dollar.

The Act of 1986 remedied these problems in the following ways:

- It transferred certain offences, notably mergers and monopolies, from criminal to civil law.

- It established a new body, the Competition Tribunal, to deal with the expanded civil law area of the Act. The Tribunal is made up not only of judges, but also of people with expertise in business and economics.
- And for the remaining criminal offences, the law has been made tougher and clearer.

The second goal was Balance. Modern competition law must do several jobs well. The Government must be able to intervene to protect competition. But it must do so without stifling enterprise and initiative. The scales of justice must be sensitive enough to weigh not just the negative, anticompetitive impact of a given action, but the positive gains that may result -- lower prices, better services or gains in efficiency. Last but not least, Canadian competition law must look at the world of the late 20th century clearly and with a wide-angle lens. It must see each situation in context -- particularly in the context of foreign competition and international trade.

The new Act has that balance. In dealing with mergers, for example, it says that the Tribunal must measure what it calls "efficiency gains," and their impact on exports and imports. In addition, in the evaluation of mergers the influence of foreign competition and the presence or absence of trade barriers for the industry in question must be considered, among other factors.

Another example of that balance can be found in the way the Act deals with specialization agreements -- under which

companies agree to concentrate on certain products or services to achieve economies of scale. Specialization agreements are important to Canada and to our productivity. To meet the needs of Canadian business in increasingly global markets, our manufacturing sector, which has a particularly high proportion of small-scale plants with short production runs, will need to be restructured.

With GATT and with Free Trade, these plants have not only the need but the opportunity to expand and so reap economies of scale. And one way to do that may be through specialization agreements.

There were concerns that the old Act served as a disincentive to these arrangements. Companies feared, perhaps not unreasonably, that a specialization agreement might bring on an inquiry or prosecution of conspiracy. Under the Competition Act of 1986, these agreements can be registered and made exempt from prosecution where they bring about real gains in efficiency.

Here is another area -- one that may be of special interest to you -- agreements relating only to the export of products from Canada. Canadian businesses were sometimes hesitant to act together in export markets for fear of prosecution at home. As a result, changes were made to clarify the law and remove those fears.

For example, the old Act would not have allowed some export agreements that resulted in a reduction of the volume

of exports from Canada, even though they may have had the effect of increasing the real value of Canadian exports. The new law has changed that.

This is another change consistent with the objectives of the Act -- to expand the opportunities for Canadian participation in world markets. But this is not a blanket exemption. As before, export arrangements which have the effect of lessening competition unduly at home are outlawed.

The third goal was the shift to Prevention. With this Act we can do more than we could to head trouble off at the pass. We have added to our toolbox of alternative, preventative resolution techniques, ranging from the casual to the strictly formal. Let me mention some of them in that order.

Information contacts. If it comes to the attention of the Director that a company seems to be on a collision course with the Act, he does not have to wait for the accident to happen. He can take the initiative in letting the parties involved know what the Act says and how it might apply in this instance.

Another informal instrument is the Advisory Opinion usually given in response to an informal request from businesses. These are ordinarily couched in hypothetical "what if?" terms. What if, for instance, Company A attempts to acquire Company B under the following circumstances... would there be trouble under the merger law? What if we

offered a price rebate along the following lines... would it violate the price discrimination requirements? What if we claim that our product is faster than a speeding bullet and can clear large buildings at a single leap, would we be challenged under the Act for misleading advertising? And so on.

The process of getting an advisory opinion can be as informal as you want it to be -- you can get it anonymously through a law firm, you can even get it orally, over the phone. In some concrete cases, or the more complex ones, a written opinion may be in order. However it is done, it is an easy way to spot any possible difficulties with the Act up front -- to test the waters without diving in. At the same time, please note that the opinion is not binding. All parties retain all their options for future action.

Moving into the formal zone we come to the Advance Ruling Certificates. These are used to "pre-clear" mergers, and they carry with them an assurance that the Director will not challenge the transaction provided it is wrapped up within one year.

Another instrument is the written and binding undertaking. In some cases where we have identified a problem under the Act, the company may prefer to take specified actions to remedy it rather than defend an action in the courts or before the Competition Tribunal. The nature of the undertaking will depend on the facts of the case.



With respect to the merger provisions, the Act recognizes that the impact on competition of some activities cannot be measured in advance. So it provides for a period of up to three years in which the Director can, so to speak, wait to see what happens. If problems develop, action can be taken.

Another instrument, short of a full hearing in the courts or the Tribunal, is the Consent Order which can be used in both criminal and non-criminal cases. In criminal cases, prohibition orders, on consent or otherwise, are often also a feature of the final judgment when companies are convicted of an offence.

In the non-criminal sections of the Act, the most intense action has been in mergers -- reflecting the tidal wave of takeovers of the past three years. Between June 1986 and the end of March 1989, we completed our review of 337 mergers. Three hundred and one proved to be acceptable under the Act. In 20 cases the decision was to monitor. Nine went ahead after the parties agreed to restructure their merger, three in what we call the "fix it first" mode, meaning that the restructuring took place before the deal was closed. Seven more were voluntarily abandoned, in whole or in part, because of the position taken by the Director. Four merger applications have gone to the Tribunal for consideration -- and we have recently announced an intention to file an application in another two cases.

The small number of merger cases that have reached the Tribunal reflects the successful use of these new alternative techniques. Many proposals were debugged of objectionable features en route with the help of the instruments I have mentioned.

One example in this region was Safeway's proposal to acquire Woodward's food floors in B.C. and Alberta. The Director made it clear he would challenge the transaction in that form because, in our view, it would lessen competition in certain markets. They came up with a new plan. Safeway responded with an undertaking to divest itself of 12 supermarkets in the markets of concern. At this time, the undertaking has been almost entirely fulfilled. Examples of other mergers that were not challenged after careful study were the Fletcher Challenge acquisition of B.C. Forest Products, the recent sale of Palm Dairies' B.C. assets to Fraser Valley Milk Producers Co-operative Association and Island Farm Dairies Co-operative Association and, of course, PWA's purchase of Wardair.

Other anticompetitive practices are now covered under civil law -- and, again, more effectively. The Act discarded the concept of "monopoly," replacing it with "abuse of dominant position." This joins those provisions relating to practices such as refusal to deal, tied selling, market restriction and other restrictive trade practices which are now subject to adjudication by the Competition Tribunal.

The change goes further than semantics. The old Act contributed to a degree of tunnel vision -- there was less latitude to consider the context of actions, to weigh the impact of such factors as the presence or absence of trade barriers, the pressure of foreign competition and gains in efficiency that might result from the action. The new Act has good peripheral vision. Written to match the realities of global markets and multinational giants, it recognizes that big is not necessarily bad. Indeed, big may be just what many Canadian firms need to be to survive and provide jobs and export earnings to Canada.

So the Act focusses on the abuse of bigness -- on the issue of how a dominant firm uses its market power. In particular, whether it uses its size to insulate itself from competition.

Many of the preventative techniques mentioned earlier are available for use in this area. And they have been used on several occasions.

In fact, few cases have made it to the Tribunal precisely because businesses have preferred to take advantage of the alternate ways of resolving problems.

Let me give you an example. Last year, we looked at a complaint from a Canadian manufacturer whose supplies of a key input were cut off. This raised serious problems under the refusal to deal provisions of the Act. After some discussions, the parties came to a compromise. The

complainant found a way to manufacture the input himself and the supplier agreed to keep him as a customer until his production was in full swing. Not only did this resolve the business problem, but it will arguably lead to more investment and jobs in Canada and result in a more competitive market.

There are, of course, occasions when this kind of resolution is not possible. In such instances there is the option of taking the case to the Tribunal. And it is an option we are ready and able to use. In the first such case, other than a merger, we have taken Chrysler Canada to the Tribunal for refusing to continue supplies to an independent who wanted to export. There are several other cases in progress which will wind up there.

Conspiracies in restraint of trade were criminal offences in the old Act and they are criminal in the new. The difference is that the law is now more effective and even tougher. The use of circumstantial evidence has been clarified. The fines have gone from \$1 million to \$10 million as a result of the 1986 amendments.

The catalogue of criminal offences includes bid-rigging, price fixing, predatory pricing and price maintenance. The items to which we are giving priority attention are bid-rigging and price fixing, particularly in relation to government contracts.

Just as in the non-criminal sections, we have been able to adopt a new flexibility in the way we resolve problems.

Where appropriate we can take action to get anticompetitive behaviour stopped short of court. In some cases we have gone this way. One recent example of this involved the real estate industry. In 1986, we received complaints alleging price fixing by nine real estate boards in five provinces. During our inquiry, the Canadian Real Estate Association approached us to say they were interested in negotiating a resolution without litigation.

We were able to work out the terms of a Prohibition Order later issued by the Federal Court of Canada. It prohibits price and commission fixing and a number of other activities harmful to competition. The Order, and this is an important point, prohibits this behaviour in the future and applies to the industry from coast to coast. The Order also removes artificial barriers to entry erected by boards and thereby will enhance the introduction of new innovative services.

Another example involved two Ontario law associations. In January 1988, the Supreme Court of Ontario issued prohibition orders against the law associations of the Counties of Kent and Waterloo. These related to inquiries we were making into alleged price-fixing activities. Again, the orders brought an immediate remedy to the problem. And the Law Society sent a letter to all its members telling them that a conviction under the competition law for price fixing would be treated the same as other serious criminal offences. This, by the way, is the first time lawyers in



Canada have been made subject to prohibition orders under competition legislation.

A note of caution here, please. The last impression I want to leave is that these relatively non-litigious resolutions are always possible. They are not always possible. They are not always even desirable.

Sometimes the public interest requires that we pursue a conviction in the courts, in accordance with the provisions of the Act, which also allows for two important messages. One, that the parties who commit these offences are not savvy business people committing minor infractions, but those who have committed serious criminal offences. The other message is that actions of this kind are costly -- that crime does not pay -- that penalties for such violations do not simply reflect the cost of doing business.

Let us look at some examples of convictions since 1986.

Last June four companies in the business forms industry, Moore Business Forms and R.L. Crain, Southam Printing and Lawson Business Forms (Manitoba) were convicted of bid-rigging on government contracts in the Province of Saskatchewan. The outcome was fines totalling \$1.6 million, the largest fine imposed under any section of competition law in its one hundred years of existence. Moore and Crain were also fined \$200,000 each for a similar offence in Nova Scotia.

This winter, three soft-drink bottlers in Manitoba were convicted of price fixing under the Act. Blackwood

Beverages and Beverage Services were charged with offences in the Brandon trade area, and Blackwood and Coca Cola Ltd. were charged with offences in the Winnipeg trade area. The fines imposed totalled \$240,000 and all companies are now subject to a prohibition order.

Last January, Commodore Business Machines was convicted of four offences under the Act and fined \$95,000. Here in Vancouver, in February, Toshiba Canada was convicted of two counts of price maintenance and fined \$65,000.

And just last month, in Winnipeg, Shell Canada was fined \$100,000 under the Act for price maintenance, or vertical price fixing, after one of its representatives tried to get a service station operator to get his prices back up. It is an important case. The court found that Shell was worried that the dealer's price cut would start a city-wide price war. That case is now under appeal.

Many of these decisions have set new record levels of fines. But we are not satisfied that that is enough to fulfill the objectives of the Act in cases of knowledgeable criminal conduct. We are currently working with the Department of Justice to seek, in the more serious cases, higher fines, charges against individuals involved and even significant jail terms where appropriate. We are also working with Justice lawyers on a program of granting immunity to individuals who choose at an early stage to co-operate in giving evidence.

Having said that, we still prefer voluntary compliance and are doing all we can to promote it. To that end, we have worked hard to develop a comprehensive program of communication. Last year we began publishing a series of information bulletins on various provisions of the Act and their administration. We have also been holding regular consultations with representatives of business, legal, consumer and other groups.

In addition to our marketing practices offices, the Competition Bureau now has officers permanently located in three major centres: Vancouver, Toronto and Montreal. The first was Craig Fulton, here in Vancouver. The obvious usefulness of that move led to its extension to the two other locations.

And that brings me to my closing point. Enforcement of competition law inevitably involves some confrontation with violators. But the task goes beyond that. Protection of competition cannot and does not begin and end with the Competition Bureau, or the Tribunal or even the Courts. It has to be a co-operative enterprise.

And it can be. If there is a common cause Canadians can agree on, it is the need to keep competition vigorous and fair. It is a consumer cause -- competition keeps the service keen and courteous, the choice varied, and the price right. Competition effectively protected also gives the small enterprise and the new enterprise the confidence it

needs to go head to head with the big guys on the block. And it keeps all business sharp -- keeping the pressure on for greater efficiency and innovation.

We rely on you to help us in protecting competition. Our inquiries usually start with a complaint from business or sometimes a private citizen.

Our part in this process is to enforce the law effectively and, above all, consistently. Businesses want to know that violations will be detected, that the lawbreakers will not have a competitive edge. We have all heard about that famous level playing field. Our job is to keep it level.

Doing that job well was always important, even in a time of horses and buggies and imperial preference. In a time of new technology, new markets and new competitors -- it is an even more important priority.

We now have a competition law that matches the realities of our time. And we are going to use it effectively and fairly.







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**RECENT EXPERIENCE WITH MERGER REVIEW  
IN CANADA**

NOTES FOR AN ADDRESS  
TO THE LAW SOCIETY OF UPPER CANADA  
PROGRAM ON COMPETITION LAW

BY

CALVIN S. GOLDMAN, Q.C.  
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BUREAU OF COMPETITION POLICY



TORONTO, MAY 16, 1989



I am pleased to be here today to discuss with you our recent experience with merger review in Canada. Mergers and acquisitions have grown in number and size not only in Canada, but also in the United States and in Europe. For many of you, whether or not you currently practice in this area, the opportunity may present itself in the not-too-distant future. When it does, it will be important to be fully informed about one of the key differences between pre-1986 and the present in the merger area -- I am speaking, of course, of the Competition Act.

I have spoken in the past at some length on the merger provisions of the Competition Act, our approach to merger review and some of the results achieved since the Act was passed in June 1986. Today I will initially discuss the framework for merger review and our compliance-oriented approach to it, and then focus on some recent developments which we are confident are enhancing the merger review process.

Some of you who follow the Competition Bureau's work closely may have noticed in recent months more extensive news releases and backgrounders regarding decisions not to challenge certain mergers. For mergers in which a challenge is appropriate, I have made a public announcement of my intention to file an application before the Competition Tribunal. As well, you may have observed that more merger cases are proceeding to the Competition Tribunal on a

consent order basis. I would like to speak about each one of these developments. But first, I would like to offer some general comments on merger review under the Competition Act.

### Merger Review under the Competition Act

The Competition Act specifically establishes the standard against which mergers are to be examined. We must determine whether the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. The Director is authorized to seek a remedial order from the Competition Tribunal when this standard has been reached.

In our assessment of the impact of a merger under the Competition Act, we abandon tunnel vision. The competitive implications of a merger cannot be assessed solely on the basis of industry concentration or the market shares of the participants. Simple quantitative criteria such as concentration ratios are not determinative. The Act require us to consider a whole range of other "qualitative" factors. These include the extent of effective foreign competition; the possibility of a failing business; the availability of acceptable product substitutes; the existence of any trade, regulatory or other barriers to entry; the extent of effective competition remaining in the market; whether the merger is likely to result in the removal of a vigorous and effective competitor; the nature and extent of innovation and any

other factor that is relevant to competition in a market.

In addition, it is not only the negative effects on competition which are considered in merger review, but also the benefits for the Canadian economy flowing from more efficient industry. An efficiency exception for mergers was incorporated in the 1986 revisions. Mergers are not to be blocked if they bring about gains in efficiency that will be greater than, and will offset, the effects of any lessening of competition resulting from the merger, and if such efficiency gains would not likely be attained if an order were made. In short, the Act requires that we examine a merger from a practical and real-world economic perspective.

The overwhelming majority of mergers do not give rise to significant competition issues, and in fact we have only opened files on a small proportion of the mergers that have taken place in Canada. We open files for examination purposes only when time spent by an officer on a transaction exceeds two days; this inevitably includes all requests for Advance Ruling Certificates (ARCs) and notification filings under Part VIII of the Act. The number of ARC requests and notification filings have been increasing significantly, and these now constitute the great majority of the files opened for purposes of merger examinations.\* A significant number

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\* Since passage of the Act on June 19, 1986, to May 4, 1989, the Bureau has received 131 ARC requests, of which 99 have been granted. In fiscal year 1987/88, ARCs constituted



of the files opened pertain to those proposed mergers which are the subject of a compulsory notification filing under Part VIII.

From June 19, 1986, until May 4, 1989, 402 files have been opened regarding examinations which required two days or more of officer time or which pertained to ARC requests or notifiable transactions. Of these merger examinations, 321 were concluded as posing no issue under the Act; many of them were resolved after a few days of officer time. In 26 cases the decision was to monitor the actual effects of the merger within the three-year period provided under the Act. In three other cases we decided not to launch a challenge because the competition concern was removed by a pre-closing restructuring of the transaction. In six other cases we decided not to challenge the merger because the parties undertook to restructure the transactions after closing so as to alleviate competition concerns. Seven

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about 18 percent of merger examinations, and in fiscal year 1988/89, this figure rose to approximately 31 percent. Since July 15, 1987, when provisions regarding notification filings came into effect, the Bureau received 65 such filings in fiscal year 1987/88, and received 92 such filings in fiscal year 1988/89. Additional notification filings and ARC requests have been received in the current fiscal year.

Expressed as a percentage, the number of notification filings and ARC requests have constituted approximately 62 percent of total merger examinations commenced in fiscal year 1987/88 and 79 percent in fiscal year 1988/89. This percentage is continuing to increase in the current fiscal year.

others were voluntarily abandoned by the parties for reasons, in whole or in part, related to our concerns. An additional five merger applications have gone to the Tribunal for consideration -- and we have recently announced an intention to file applications before the Tribunal in another two cases. The remaining files involve ongoing examinations.

The assessment of a merger involves an in-depth understanding of the business and competition dynamics of the particular industry in question. This requires substantial information on both the market and its participants. Our analysis of the likely impact of the merger typically addresses each relevant competitive dimension such as price, level of service, quality, product choice and innovation. To assist in this assessment, we augment our staff expertise by bringing in outside economists, lawyers, accountants, and independent industry experts as required.

The initial source of information for the assessment comes from the parties themselves. They are encouraged to provide as much information as possible on the transaction and its competitive impact. However, that information alone may not be sufficient to achieve a full and objective understanding of the potential impact of the transaction. To do that often requires the input of others who will be affected. We actively seek information from suppliers, competitors, customers and consumers. The privacy and

confidentiality provisions of the Act and common sense dictate that these consultations be discreet. Discreet though they are, they may nevertheless be extensive. The greater the economic significance of the merger, the more expansive our consultations with third parties will be.

### Compliance-Oriented Approach

I think it is fair to say that parties to proposed mergers generally desire as much certainty as possible on the timing, terms and legality of the transaction. Thus, in most instances, the parties try to ensure that the proposed merger complies with the Act. It is not surprising, therefore, that we have such a high degree of compliance with the notifiable transactions provisions of the Act. We find as well that a great number of mergers below the notification thresholds are brought to our attention early on by the parties themselves. They need to know on a timely basis if the transaction they propose may give rise to competition concerns.

In those cases where potential concerns are identified, the parties themselves are usually willing to seek ways to bring the transaction within the terms of the Act. In those few cases where the parties are determined to proceed with their transaction notwithstanding our competition concerns, there is of course the availability of proceedings before the Tribunal on a contested basis.

The approach which we have adopted to the enforcement of the merger provisions of the Act gives businesses every reasonable opportunity to arrange their affairs to ensure compliance with the Act. This is what we call our compliance-oriented approach. The doors of the Bureau are open to business people who wish to discuss contemplated transactions. The doors are open to discussions and consultations throughout the examination process. As I mentioned earlier, there is also consultation with affected third parties. Where potential competition concerns are identified, we discuss them with the merging parties, thereby providing an opportunity to address their concerns. This may involve a further factual analysis regarding specific issues or a review of various options available under the Act. If the parties put forward a reasonable proposal which is designed to alleviate the competition concerns, that proposal will also be examined and a further round of consultations, including those with affected third parties, may take place. The compliance-oriented approach relies on resort to the Tribunal to enforce the Act on a contested basis only where that course of action proves necessary to achieve the objectives of the Act.

This compliance-oriented approach is both expeditious and workable. In almost all cases where competition concerns are identified, the parties can take steps to comply with the Act. The small number of contested applica-

tions brought before the Tribunal is not, as some might suggest, a sign of an ineffective merger law or insufficient enforcement. Quite the contrary, it is, in my view, a reflection of the realistic and flexible framework of the Act and the success of the compliance program.

During my three years with the Bureau, I have publicly discussed at some length the range of alternatives available to address merger cases under the Act including: advance ruling certificates; advisory opinions; monitoring; pre-closing fix-it-first resolutions; post-closing restructuring, including undertakings and consents orders; and finally, contested applications to the Competition Tribunal. Today, as I indicated earlier, I would like to focus on three recent developments in our compliance approach:

1. The enhancement of our public information program through the elaboration of reasons not to challenge a merger.
2. The announcement of an intention to file an application before the Tribunal in those merger matters in which a substantial lessening of competition has been identified.
3. The increased use of consent order proceedings before the Competition Tribunal.



Each of these developments is part of our on-going effort to ensure that the merger review process is carried out in a manner that is well understood by the various communities we serve, and to provide all available opportunity to interested and affected parties to make their views known. Each of these developments has been put into place having regard to the limitations of the confidentiality provisions of the Act.

### The Information Program

Since the passage of the Act, a high priority has been placed on providing information to the public about the new legislation and the administration of it. Information on what we do and how we do it permits everyone to better appreciate, understand and evaluate the approach taken by the Bureau. It also permits businesses to better integrate Competition Act considerations into the planning stages of a merger.

Since the summer of 1986, I and senior members of the Bureau have given about 100 speeches, over 30 of which are available to the public in written form, on the new provisions of the Act, on our enforcement of the Act, and detailing the merger review process itself.

The Annual Report to the Minister, which is tabled before Parliament, has been prepared in a new, more readable format. It now contains an overview of the activities of the Bureau for the year and a specific chapter on mergers.

We have also tried to anticipate questions relating to new developments and to provide timely and useful materials to address these questions. For instance, subsequent to the notification provisions of the Act coming into force in July 1987, an information kit was produced and widely distributed. This was designed to inform the business community of the new notifiable transactions requirements and to assist them in meeting these requirements.

We also initiated the publication of a series of information bulletins on various provisions of the Act. To date we have released one on the Merger Provisions and a second on Advance Ruling Certificates. A bulletin on our Program of Compliance is to be issued in June, to be followed by bulletins addressing the efficiency exception, the failing firm factor, barriers to entry, and the merger review process. The volume of work within the Bureau has not enabled us to meet our original schedule of bulletins, but we are striving to complete the ones I just mentioned before the end of the year.

Perhaps the most important ongoing element of our public information program is the simple press release. While always mindful of the confidentiality provisions of the Act, we believe it is necessary to provide timely information on merger case decisions and resolutions through press releases. In some of the more significant cases, we have also issued accompanying backgrounders.

We devote much time and effort to finding ways to maximize the public dissemination of information on specific merger cases and their resolutions. In discussions with the parties to certain mergers, the need to put appropriate information in the public domain is often addressed and we have occasionally encouraged parties to assist us in keeping the public informed. The need to provide sufficient and timely information to the general public arises essentially in the context of those mergers which have already become public knowledge and which are of economic significance. A balancing process is therefore required. The information program has been developed in the context of the need for confidentiality in business affairs. Nothing that is being done in the area of public communications is intended to alter that foundation.

In recent months we have engaged in consultations with representatives of the business and legal communities and consumer groups. Consultative meetings of this nature are certainly not new to the Bureau. It was generally acknowledged that we should continue to try to increase the information provided to the public on the resolution of particular cases. This information will assist the public to better understand the Act and the administration of it. It will ensure the public has timely information. A better informed public is able to participate more effectively in the process. In addition, the business and legal communi-

ties in particular are better equipped to plan future transactions within the framework of the Act; and the antitrust community as a whole, including the academic community, is better able to analyze the administration of the Act. As a result, some recent press releases have been accompanied by backgrounders which have provided greater detail on transactions and on the considerations giving rise to the decision not to challenge a transaction.

I would note that the question of how much information is to be disseminated publicly has been the subject of much advice and many opinions since my arrival in Ottawa. It was the subject of a lively debate at my first Consultative Forum in September 1987 with private sector lawyers, economists, and business and consumer representatives convened to discuss the implementation of the merger provisions. It has also been the subject of numerous discussions between members of the Bureau and counsel from the Department of Justice in relation to the scope and operational limitations of the new confidentiality provisions of the 1986 legislation.

In certain recent announcements we have endeavoured to indicate not only which factors were given significant consideration in our assessment, but to provide even greater guidance on our interpretation of the various factors identified in the Act. The extent to which we provide this more detailed information depends upon the nature and

significance of the merger, which therefore enables us to allocate our resources in an effective manner on a case-specific basis.

I would like to highlight two recent case examples. The first was the decision not to challenge the completion of the proposed acquisition of Wardair Inc. by PWA Corporation. In the context of that particular merger assessment, an eight-page backgrounder accompanied one of the news releases and provided information on how the Bureau considered the section 93 factors of:

- . failing business
- . barriers to entry, including regulatory control over entry
- . potential foreign competition
- . effective remaining competition, and
- . the removal of an effective and vigorous competitor.

A considerable portion of the backgrounder was devoted to the application of the failing firm factor to the situation in that case.

The proposed acquisition of the assets of Domglas Inc. by Consumer Packaging Inc. was a second case in which the public announcement not to challenge the transaction was accompanied by a four-page backgrounder offering further details on the Bureau's assessment. In particular, the backgrounder provided information on how we examined the factors of product substitutability, import competition and



potential efficiency gains resulting from the merger. Copies of the news release and the backgrounders in both the Wardair and Domglas matter can be obtained from the Bureau. For those of you who would like to obtain copies today I have brought several copies of each for distribution.

### Intention to File

We have recently adopted a practice of publicly announcing the intention to file an application before the Tribunal in situations where I have determined that competition is likely to be lessened substantially within the meaning of the Act should the transaction proceed as proposed. These announcements are only made in cases involving mergers that the parties have already publicly announced. This practice allows all parties affected by the merger to have timely relevant information and puts investors, both large and small, on an equal information footing. This announcement will also provide an additional opportunity for affected or interested persons to communicate to the Director any relevant information they may have if they have not already done so, before the application is actually filed with the Tribunal. Therefore, the notice of intention will assist in ensuring that the administration of the merger provisions of the Act is done in a fair and effective fashion.

I should note that a similar practice has been followed for many years by the Antitrust Division of the U.S. Department of Justice in relation to merger cases before them. They have found that such announcements have tended to expedite the resolution of merger cases in certain instances.

The notices will contain a statement of my intention to make an application to the Tribunal together with a very brief statement of the circumstances supporting this intention. There will be no disclosure of confidential information. Nor will the general theory of the case be provided. The full basis for the application would only become available when the application is filed with the Tribunal. It would of course be our intention to file the application as soon as reasonably possible after issuing the notice. The expected time is in the range of two to four weeks.

It is our belief that parties will not be prejudiced by this initiative. Merger proposals that are only being contemplated by a party or parties and are not yet proceeding publicly, will not be the subject of these announcements, unless and until the parties decide to go forward publicly with their proposal.

Before the notice is given, the Bureau staff would have thoroughly explained to the merging parties their assessment of the transaction and their views of the competition issues

raised. The parties will have had an opportunity at that stage to discuss staff concerns, to provide evidence by way of rebuttal or to put forward proposals to alleviate competition concerns. Where staff recommend that an application be made to the Tribunal, the parties will have an opportunity to meet with me personally to discuss the matter. Where I am of the view that concerns under the Act still exist and that proposals, if any, submitted by the parties have not alleviated those concerns, parties are encouraged to consider again whether their objectives can be carried out while at the same time addressing competition issues that would otherwise require initiating contested proceedings before the Tribunal. However, where it is my intention to make an application to the Tribunal, the parties will be informed of that decision before the announcement of the intent to file is made. The public announcement of my intention will generally be made shortly after the parties are informed of my position, usually within two to three days.

It is of course possible that between the time of the announcement of intent to file an application and the time that the application is actually filed, the parties may submit a revised proposal which addresses the concerns giving rise to the application. If these proposals are in fact successful in removing the basis for challenging the merger, there would be a further announcement to the public

pertaining to the resolution of the matter. Such a second announcement could involve a true "fix-it-first" resolution, which means a restructuring before closing, thereby obviating the basis for any application to the Tribunal. Or it could involve a post-closing restructuring which may necessitate an application to the Tribunal on a consent order basis, or possibly undertakings to my office in those cases where an immediate application to the Tribunal would not be necessary.

Recently, I have issued such a notice with respect to the acquisition by Baxter Foods Limited of the dairy processing business of McKay's Dairy Limited. As well, a notice was issued in the acquisition of the electric power transmission and distribution business of Westinghouse Canada Inc. by Asea Brown Boveri Inc.

The Asea Brown Boveri acquisition of Westinghouse Canada is currently before the Competition Tribunal on the basis of a proposed consent order. The first public announcement in this case was the notification of an intention to file an application with the Tribunal. Subsequent to the initial announcement, a second public statement was made indicating a proposed resolution would be submitted to the Tribunal on the basis of an application for a consent order. Because the matter is now before the Tribunal, I do not propose to discuss it further at this time. Copies of both announcements are available from the

Bureau. Copies of the draft consent order and the competitive impact statement submitted in support of that order are available from the Competition Tribunal Registry.

### Increased Use of the Tribunal

As I indicated in some of my earlier speeches, greater use of alternatives to contested litigation, including the consent order route, can achieve timely, less costly and effective results in appropriate circumstances. Over the past two years, we have been successfully making greater use of the prohibition order provisions on a consent basis in relation to the criminal sections of the Act. I hope we can achieve similar success in relation to the non-criminal sections of the Act.

It is likely therefore that greater use will be made of applications to the Competition Tribunal on a consent order basis in appropriate merger cases. Recently, filing for such orders has been made not only in the ABB case just referred to, but also in the Gemini case which involves the merger of the airline computer reservation systems of Air Canada and Canadian Airlines International. While I will retain flexibility in some situations involving post-closing restructuring to accept written undertakings, I think it is likely that we will see an increasing number of these post-closing resolutions being processed by the Tribunal on a consent order basis. The Tribunal rules of practice and



procedure afford an opportunity for public proceedings. Increased use of the consent order process will provide a body of precedent which will, over time, contribute both certainty and predictability to the voluntary compliance program.

I should emphasize once again that pre-closing restructuring -- that is, those mergers that are resolved on a true "fix-it-first" basis -- generally will not be the subject of a Tribunal application because the legal foundation for such application will not arise. It is essentially resolutions involving post-closing restructuring or other post-closing conduct which may be the subject of a consent order application or undertakings. I should also add that where undertakings are accepted, they will usually be backed up by a signed consent of the parties to an order in the same terms, which order will only be sought if the undertakings are not fulfilled. That is a practice we have made use of over the past two years.

Factors which we may consider in the selection of cases which will proceed on the basis of an application for a consent order, as opposed to the acceptance of undertakings, include:

- a) the economic significance of the case;
- b) the need to ensure long-term enforceability, that is, beyond the three-year limitation period provided for in the law;

- c) the need for certainty of immediate enforceability;
- d) the anticipated need for possible variation in the future;
- e) the precedential value of the order sought; and
- f) the unique character of the case or the proposed resolution.

As I have stated earlier, the Tribunal consent order process is fully consistent with the compliance-oriented approach. Unlike contested proceedings, the consent order process was intended by Parliament to afford an expeditious means of disposing the cases without the evidentiary requirements of a contested application. The consent order process should not be unnecessarily encumbered by the uncertainty, time considerations and high costs associated with contested proceedings.

#### Addressing Some Misconceptions

It must be stressed that the voluntary compliance program is intended to support the prevalent desire of business people to reorganize their affairs to ensure compliance with the Act and thereby achieve more certainty in their business transactions. In those cases where the parties to the merger are determined to proceed with their transaction notwithstanding competition concerns, I remain fully prepared to pursue the matter on a contested basis before the Tribunal.

Let me repeat, however, that the Act does not contemplate that every merger ought to be brought before the Tribunal for a determination of whether or not the merger substantially lessens competition. Nor is it appropriate for the Director to make an application to the Tribunal simply because the application may raise interesting questions of some public interest. The statutory standard against which mergers are to be examined is a substantial lessening or prevention of competition in a relevant market. It is a substantial lessening of competition which must be proved and, if there is no basis for an application on that ground, the case cannot proceed to the Tribunal. Equally, if the parties organize their affairs so that the foundation for an application is removed, there is no case to take to the Tribunal, i.e., as in the case of a true fix-it-first resolution.

Let me also confirm that there is no reluctance on our part to go to the Tribunal if that is what it takes to solve the problem. However, from our experience over the past three years, there is a reluctance on the part of most of the businesses concerned -- based on their desire to avoid public scrutiny of their future plans and the inevitable delay, expense and uncertainty of the full litigation process. Litigating the future effects of a proposed merger is simply not the same as litigation over past conduct. And from my discussions with my OECD counterparts, I can tell

you that the reluctance of businesses to embark on a contested adversarial proceeding in relation to a proposed merger is similar in other industrialized nations.

I might also note that there is nothing new in the acceptance of undertakings for post-closing restructuring to resolve competition concerns. Undertakings have been accepted by my predecessors since the 1960s. This practice is fully supported by the legal advice provided to the Bureau. In fact, undertakings were used in relation to the (criminal) merger provisions under the Combines Investigation Act. In addition, I would note that Mr. Justice Strayer, writing for the Competition Tribunal, acknowledged in a decision he wrote regarding intervenors in the Gemini case, that settlements may be reached between the Director and the parties to a merger in instances where there is no necessity of a consequent application to the Tribunal for a consent order.

### Conclusion

I would like to conclude by emphasizing two points. First, the compliance-oriented approach to merger review continues to be an integral part of our administration of the Act. The approach gives business every possible opportunity to structure their affairs within the parameters of the law. Also, it relies on a broad range of remedies to address and to alleviate problematic situations under the

Act. I continue to believe that the essential elements of an open-door, consultative and flexible approach will lead to realistic, properly informed and well-reasoned decisions. Additionally, I would stress that my commitment to seek fix-it-first solutions whenever possible is as strong as ever.

Second, the developments of the last number of months are simply enhancements to the fundamental compliance-oriented approach to merger review. More elaboration on reasons not to challenge certain mergers, announcements of an intention to file an application to the Competition Tribunal, and greater use of the consent order mechanism for post-closing restructurings are all part of the evolving process. These enhancements to our fundamental approach are consistent with our desire to make merger review in Canada second to none in terms of expeditiousness, effectiveness and fairness.

### Postscript

I can't leave this discussion of recent developments in the administration of merger review without touching briefly on two decisions delivered a few weeks ago by the Supreme Court of Canada in the City National Leasing and Rocois Construction cases. In upholding the constitutional validity of section 31.1 of the Combines Investigation Act, which creates a civil cause of action, the Court upheld the



Combines Investigation Act as valid federal legislation under the general trade and commerce power. The Court also noted that in numerous cases the Act had already been upheld under the federal criminal law power.

These decisions provide very strong constitutional support for the merger provisions and the provisions regarding reviewable matters which were enacted in the 1986 Competition Act. The scheme of competition regulation in the new legislation is even more complex than that contained in the Combines Investigation Act.

In addition, several of the comments of the Chief Justice in the City National Leasing case acknowledge the significant importance of the federal competition laws to the Canadian economy. Speaking for the Court, Chief Justice Dickson made the following comments:

"From this overview of the Combines Investigation Act I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the marketplace. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy." (p. 32-3).

...

"As I noted earlier, the purpose of the Act is to ensure the existence of a healthy level of competition in the Canadian economy. The deleterious effects of anti-competitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy." (p.35).

...  
"In sum, the Combines Investigation Act is a complex scheme of competition regulation aimed at improving the economic welfare of the nation as a whole." (p. 38).

These decisions confirm that our federal competition law is constitutionally positioned on a very solid foundation. Constitutional questions that have existed since the 1931 decision of the Privy Council in the P.A.T.A. case have now been addressed.

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**THE PRICING PRACTICES PROVISIONS OF THE  
COMPETITION ACT**

NOTES FOR AN ADDRESS

TO THE

LAW SOCIETY OF UPPER CANADA

PROGRAM ON THE COMPETITION ACT

BY

WAYNE D. CRITCHLEY

DEPUTY DIRECTOR OF INVESTIGATION AND RESEARCH

(RESOURCES AND MANUFACTURING)

CONSUMER AND CORPORATE AFFAIRS CANADA

TORONTO, MAY 16, 1989

## I. INTRODUCTION

It is a pleasure for me to be with you today as you study Canada's competition law.

I have been asked to address specifically the law relating to pricing practices. My comments will be focussed on four principle areas -- the provisions of the Competition Act related to price discrimination and predatory pricing; the law on price maintenance; the current enforcement policy of the Bureau of Competition Policy with respect to these matters; and finally, as a case study, the recent conviction of Shell Canada Products Limited.

## II. DISCRIMINATORY AND PREDATORY PRICING

The Canadian law respecting price discrimination and predatory pricing traces its roots to the depression of the 1930s. The enactment of criminal prohibitions on these practices followed from a recommendation of the Royal Commission on Price Spreads in 1935.

The legislative history of what is now section 50 of the Competition Act reveals the concern of that period in our economic history about "unfair competition" and the potential abuse by large firms such as department stores and chain stores of their market power to drive independent competitors out of the market and ultimately create monopoly or near monopoly situations.



The difficulty with the notion of "unfair competition" is how to distinguish it from vigorous competition. That difficulty may be even greater when an industry is facing adjustments in the form of innovation, excess capacity, and the entry of new firms. How does one determine if a firm is the victim of predatory pricing or is simply paying the price for being a less efficient or less innovative player in the market?

It is sometimes argued that the purpose of these provisions appears to be directed more to the protection of small business than to the primary objective of competition policy, which is to promote the efficiency and adaptability of the Canadian economy. These goals are not necessarily exclusive. Also, the new purpose clause of the Competition Act recognizes that an objective of the law is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.

Because there have been so few prosecutions taken under these sections, there has also been some debate as to whether Canadian business is so well-behaved (or perhaps so well-advised by counsel) that conflicts rarely arise, or whether the law itself is so limited in scope and the burden of proof so high that few incidents of discriminatory pricing or predatory pricing are caught within it. Whichever view may be correct, the fact is that there has been virtually no legislative change since the original enactment in 1935.

## A. Price Discrimination

The price discrimination provision in subsection 50(1) of the Competition Act can be summarized as follows: It is an offence for a supplier to make a practice of discriminating, directly or indirectly, between purchasers who are in competition with one another and who are purchasing like quantity and quality of articles.

There are a number of elements of the offence of price discrimination; let me reduce them to these six:

- a) There are sales to two or more customers that can be compared.
- b) There is a discount, rebate, allowance, price concession or other advantage granted to one purchaser not available to another.
- c) The resulting discrimination is between purchasers who are in competition with one another.
- d) The sales are with respect to like quality and quantity of articles and are made at about the same time.
- e) There is a practice of discriminating.
- f) The supplier has knowledge that there is discrimination.

All of these elements must exist in order for there to be an offence.

Let me expand upon this with some general observations:

- The section applies only to the sale of articles and not to services.

- It does not prevent or preclude suppliers from passing on to customers savings that might be achieved through sales of large quantities. Discounts or allowances based on volume of purchases are not illegal. (However, such discounts must be available to all competing purchasers with respect to sales of like quality and quantity.)
- The law does not prohibit granting special price concessions in the case of one-time events such as a store opening special or a stock clearance sale. There is only an offence if there is a practice of discrimination.
- The law does not require a cost justification for the volume discount. It is important to remember, though, that the volume discount must be available to all competing purchasers who may buy in the same quantity.
- We have expressed the view that the law would not preclude providing volume discounts in the form of rebates paid periodically based on quantities purchased over a reasonable period of time, provided once again, of course, that they are available to all competing purchasers.
- The question of like quality may require a careful examination in instances where products are sold under different brands -- for example, the manufacturer's own brand and a private label. Presumably, there would be

no issue where the products are treated differently by suppliers and purchasers in the market.

- Similarly, care should be taken with respect to other terms and conditions such as delivery charges and credit terms.

A number of questions have been raised in recent years concerning the application of these provisions to buying groups. Considerable interest in the 1980s led the Bureau to issue statements on this issue in the form of speeches and in other ways. Buying groups can, of course, have a positive effect on competition. In some cases, they may permit small firms to join together for purposes of obtaining the volume rebates and incentives that might be available to their integrated corporate chain competitors. Questions were raised, however, as to the circumstances under which a buying group is a true purchaser for purposes of paragraph 50(1)(a) or simply a "sham" established for the purpose of claiming discounts or rebates for its members that are larger than those to which they are lawfully entitled.

We have developed these guidelines to assist in that determination:

1. Does the buying group have a legal identity separate from that of its members?
2. Does the buying group acquire title to the articles?  
In other words, would its records substantiate (even if the member took delivery of the articles, or placed

orders as an agent for the buying group) that the group is in fact the purchaser of the articles?

3. Is the buying group liable for payment of the goods?

We receive many requests for advisory opinions about the price discrimination provisions. Interesting questions have arisen with respect to virtually all of the elements. I would like to take a few minutes today to discuss with you some of the opinions we have given recently under the Program of Advisory Opinions. To protect the innocent, I will be describing these on a no-names basis.

One frequent question that arises is how to determine if two purchasers are in competition with one another -- for example, where the manufacturer chooses to offer a different discount scheme in only one province or region. On its face it would appear that there might not be an issue; but in one case, we identified a potential problem in some markets -- for example, the National Capital Region. Where the relevant market overlaps provincial boundaries, different discount schemes may result in discrimination between competitors.

An even more difficult situation may arise with respect to the issue of functional discounts. Depending upon the industry, and the position of certain firms in it, it may be necessary to look very carefully at whether one customer identified as a "wholesaler" is or is not in competition with another customer identified as a "retailer." When



looking at such a question, you may get the best answer from your client. As in most issues of antitrust analysis, our preference is to put considerable weight on the views of the businesses involved in identifying which firms are in competition with one another.

Here is another recent advisory opinion. A firm supplying two products wanted to reward a customer who buys both products but not provide any benefit to a customer who buys only one. There would have been instances of competing purchasers buying like quality and quantity of the first product, but only one of them would be eligible for the special price concession because it also bought the second product.

Such a scheme would appear to be discriminatory. Only one of the customers would be eligible for the reward even though both customers were purchasing like quality and quantity of articles. There are, of course, alternative schemes that may meet the suppliers' objectives without running risks under the Act. For example, if the supplier was able to offer a volume discount based on total purchases of both products, and if it was prepared to make that available to all customers, there would not likely be a problem under the price discrimination provisions. (Such a scheme could be considered tied selling for purposes of section 77, but would only raise an issue if, among other things, it had one of the exclusionary effects set out in

the section resulting in a substantial lessening of competition.)

## **B. Promotional Allowances**

The prohibition on discriminatory promotional allowances was enacted in 1960 following recommendations of the Restrictive Trade Practices Commission and of the Royal Commission on Price Spreads of Food Products in 1959. It was found that the price discrimination provisions were not adequate to deal with issues related to sales promotions and advertising.

Essentially, the purpose of this section is to ensure that promotional allowances are made available to all customers on a proportionate basis so that no buyer receives an unfair advantage.

Section 51 defines an allowance as being collateral to a sale or sales of articles but not applied directly to the selling price; the allowance must be or purport to be for advertising or display purposes.

The section makes it an offence to grant an allowance which is not offered on proportionate terms to other purchasers in competition with any purchaser receiving such allowance. While many of the elements of the section are similar to those for price discrimination, it is important to note a major difference. Allowances must be offered to all competing purchasers so that each will receive a

monetary value approximately in the same ratio to its purchases.

Here is an example of an advisory opinion concerning promotional allowances. The question was raised whether the policy of a supplier to offer promotional allowances only to customers receiving allowances from other suppliers would raise a question under the Act. It was the Bureau's view that such a practice would raise questions if the allowances were not made available to all customers on a proportionate basis.

### **C. Predatory Pricing**

Section 50(1)(c) of the Competition Act prohibits predatory pricing. It is an offence to engage in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor or designed to have such effect.

When does low pricing represent predatory conduct as opposed to vigorous competition? As with price discrimination, there must be a policy. Short-term price-cutting to meet competition in the marketplace will not be offensive. Prices must be unreasonably low in the circumstances. While the jurisprudence has not established a precise definition of "unreasonably low," it will probably at least be a level below average total cost.

The leading predatory pricing case is the 1980 conviction in the Supreme Court of Ontario of Hoffmann-La Roche Limited.

Specifically, Hoffmann-La Roche had been charged with engaging in a policy of selling its drugs Librium and Valium at unreasonably low prices to hospitals across Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect. These products were first marketed in the 1960s. As a result of amendments to the Patent Act in 1969, Hoffmann-La Roche began to encounter substantial price competition from companies obtaining compulsory licenses under its patents. It responded by lowering prices to the hospital sector, which accounted for approximately 20 percent of the market. For a 12-month period, the company gave its Valium free to hospitals, a volume of product with a market price of approximately \$2 600 000.

The trial court found Hoffmann-La Roche guilty only in respect to Valium. These factors were identified by the court as being relevant in deciding whether a price is unreasonably low:

- (1) the actual difference between the production or accounting cost and the sale price of the product;
- (2) the length of time during which sales at the questionable prices take place;
- (3) the circumstances or context in which the sales take place; and

(4) whether any external or long-term economic benefits will accrue to the seller by reducing its prices below cost.

The regional price discrimination provisions in paragraph 50(1)(b) contain many of the elements found in paragraph 50(1)(c). Among other things, lower pricing in one region is prohibited if engaged in with the effect or tendency of substantially lessening competition or eliminating a competitor, or if designed to have such effect.

The ability of a firm to engage in predatory pricing implies that it possesses some measure of market power. Such conduct may also be examined therefore under the new non-criminal provisions dealing with abuse of dominant position, which are found in section 79 of the Act.

### III. PRICE MAINTENANCE

The Competition Act prohibits attempts to influence upward, or discourage the reduction of the prices at which products are sold or advertised for sale in the marketplace.

Canada's price maintenance law has its genesis in the report of the McQuarrie Committee in 1951, which had been concerned with the high rate of inflation at the time. Resale price maintenance, or the control of retail prices by suppliers, was widespread in the economy. The pressures for price maintenance often come not only from manufacturers or



suppliers, but also from competitors of the discounting firm who apply pressure on a supplier.

The present prohibition on price maintenance in section 61 of the Act was enacted in 1976:

- No person engaged in business or holding intellectual property rights
- directly or indirectly, by agreement, threat, promise or any like means
- shall attempt to influence upward or discourage the reduction of the price at which another business supplies or advertises a product.

Note that the law does not prohibit a supplier from setting maximum prices. Fortunately for consumers, this provision does not make it illegal to attempt to influence prices downward. Manufacturers and suppliers can also suggest minimum resale prices, provided they make it clear that the person receiving the suggestion is under no obligation to follow it.

It should also be noted that it is not necessary to show that the supplier was successful in influencing prices; the mere attempt may be offensive. As for what constitutes an agreement, threat, promise or any like means, the courts have registered convictions in cases involving practices such as offering inducements in the form of cooperative advertising schemes, rebates or other special allowances in return for respecting the supplier's price suggestions. I

will come back to some recent jurisprudence on what constitutes a "threat."

It is also an offence, under paragraph 61(1)(b) of the Act, to refuse to supply because of a person's low pricing policy. A further offence, and a very important one, appears in sub-section 61(6). This provision makes it illegal for a firm to pressure a supplier, by making it a condition of doing business with the supplier, to refuse to supply a third firm because of that firm's low pricing policy.

A warning to manufacturers or suppliers who are tempted to give in to such pressures from their customers: acting on such a request, and refusing supplies to another customer because of its low pricing policy, could very well make the supplier liable to a charge under paragraph 61(1)(b).

The Statement of Facts in the recent Toshiba Canada case refers to the company's actions to discourage retailers from dropping their prices on Toshiba products so as to protect their major customers from competition. Toshiba was convicted on two counts of price maintenance and fined \$65 000.

In recent years there has been considerable debate in the United States concerning that country's laws on price maintenance. As a result, there have been developments in the jurisprudence to narrow the per se prohibition of the practice. While there has been similar debate in this

country, it has not been as vigorous, in part because of differences in the Canadian law.

A key difference is that the Competition Act builds in a number of defences to a charge of refusal to supply because of a person's low pricing policy. These defences respond to some of the procompetitive rationales for price maintenance which have been put forward in recent years. Included in the defences are cases where the manufacturer believed the product was used as a loss leader or cases where the reseller failed to provide a reasonable level of service.

It is important to remember that these defences are only available on a charge of refusing to supply because of someone's low pricing policy. They do not constitute defences to attempts to influence prices upward.

#### IV. ENFORCEMENT POLICY

Perhaps because of the debate in the literature over the appropriate legislation to deal with discriminatory and predatory pricing and price maintenance, questions are sometimes raised as to the enforcement policy of the Bureau of Competition Policy with respect to these matters. Let me say at the outset that the Director of Investigation and Research continues to take the position that the Bureau will vigorously enforce all provisions of the Act.

As you may appreciate, however, our enhanced compliance approach and a significant increase in demands on resources in recent years have resulted in a re-focussing of Bureau priorities.

An Information Bulletin on the Program of Compliance will soon be available. It describes the combination of approaches that have been developed in recent years to pursue alternative techniques to promote and ensure compliance with the law.

A key part of the approach is the careful selection of cases to assure that we allocate our resources to those matters which have the greatest impact -- economic and precedential. In the criminal areas of the Act, we have identified bid-rigging and price fixing conspiracies as our major priorities. These offences clearly have the potential for the greatest economic harm and may touch all consumers. The rigging of bids on government tenders is nothing short of defrauding the public.

That is not to say that we are not pursuing cases under other sections as well. In fact, over the past year and a half, there have been a number of significant and precedential cases under the provisions dealing with discriminatory pricing, promotional allowances and price maintenance.

In December 1987, Epson (Canada) Limited was fined a total of \$200 000 on 10 counts of price maintenance -- the largest total fine under that section. The case is now

under appeal. In January of this year, Commodore Business Machines was fined \$95 000 following guilty pleas on four counts under sections 50, 51 and 61. The fine of \$25 000 for discrimination in promotional allowances was a record fine under that section. As noted earlier, in February in Vancouver, Toshiba Canada was convicted on two counts of price maintenance and fined \$65 000. At the end of March, Shell Canada Products Limited was fined \$100 000 for price maintenance, a fine equal to the record fine for that type of an offence.

I want to talk in more detail about the Shell Canada case, but first let me reiterate that there will also be many instances where alternative case resolutions may be more appropriate than court proceedings.

For example, in my Branch today, our first step in handling complaints involving criminal matters, other than price fixing and bid-rigging, is to determine if the matter is one which warrants assigning a high priority. For example, does it appear to be an isolated event rather than a company policy? Do the facts suggest that it is a first time problem or even the action of an overzealous junior employee? If so, it may be appropriate to resolve the matter with an information contact, an undertaking or some other alternate case resolution technique.

It goes without saying that we normally advise firms involved in such matters that a repetition of the conduct or



the receipt of further complaints could very well cause the issue to be identified as a priority in the future.

In light of the recent Supreme Court of Canada decision in the Rocois and City National Leasing cases, we are giving consideration to including, as one of the criteria in establishing priorities, whether a private remedy would be more appropriate. This is not to say that certain sections of the Act should be left to private enforcement, but rather that there is room for both public and private enforcement.

It is now clear that the right of private action under section 36 is available to any person who has suffered damages as a result of conduct contrary to the criminal provisions of the Act (or the failure to comply with a court or Tribunal order) regardless of whether or not the Director has conducted an inquiry.

## V. SHELL CANADA CASE

I want to talk a little bit about the recent case involving Shell Canada. This case is significant for a number of reasons: a) the jurisprudence with respect to "threat"; b) the impact on competition; and c) the prece-dential fine.

It has sometimes been argued that the prohibition on price maintenance is directed more at protecting small businesses than it is at protecting competition. That is not necessarily correct, and the Shell case provides a good example.

Let me put the case in context. The retail gasoline market is probably the source of more complaints to the Bureau of Competition Policy than any other single line of business. In some respects, gasoline marketing is a very competitive business, but in other respects and in certain markets, it is much less so. A student of economics would not be surprised to find that it is typically the case that competitors' prices in any market area tend to be the same or very similar. Price changes, either up or down, are quickly matched by competitors. In some areas price wars will break out, but many markets are characterized by relatively stable pricing.

Following its lengthy study of the petroleum industry, the Restrictive Trade Practices Commission reported in 1986 its concerns about the degree of control over retail prices exerted by the major refiners. Prior to the mid-1980s, those refiners controlled retail prices not only through their own company owned and operated outlets, but also through the widespread practice of consignment or agency selling. Although it found no evidence of activity contrary to the Competition Act, the Commission was concerned that the pricing practices of the refiners inhibited price competition among dealers at the retail level.

Beginning in 1985, a number of the refiners began to move away from consignment and agency sales and introduced schemes whereby their independent dealers would be free to

set their own retail prices. It goes without saying that these dealers are still constrained by their own costs, including the cost of product from the refiner, and local competitive conditions. But subject to these constraints (which face all businesses), they now have the freedom to set their own prices and adjust them as and when they see fit rather than on the instructions of the oil company.

Among the events which may have promoted this change in policy, apart from the RTPC inquiry, was the prosecution and conviction for price maintenance of Imperial Oil Limited in 1984 and Sunoco Inc. in 1986 with respect to certain dealer price support programs.

In April 1986, Shell Canada adopted a new dealer pricing system and informed its dealers that they would be free to set their own retail prices. In July of that year, a dealer in Winnipeg, in an attempt to boost sales during a slow period, decided to lower its prices by two cents a litre. The result was pressure from Shell and within 24 hours the dealer raised its prices back to the prevailing price in the marketplace.

As a result of these events, the Director conducted an inquiry under the Act and referred the evidence obtained to the Attorney-General of Canada. Charges were laid and following a trial in the Manitoba Court of Queen's Bench, Shell was convicted on February 27, 1989.

In his reasons, Mr. Justice Kennedy made some comments about the importance of protecting competition and the prohibition in section 61:

"There can be no doubt that price fixing is the commonly understood prohibition under the section I have just read, and especially as it relates to the sale of gasoline. It touches virtually all citizens given our dependency upon petroleum products. The Competition Act, which prohibits interfering with market forces affecting prices, is therefore of utmost importance and seriousness. Large corporations, other than by the promotion of its own product, are not allowed to influence the upward pricing of its product or to discourage the downward pricing of its goods by agreement, threat, promise or like means."

Following a careful review of the evidence, His Lordship concluded that representatives of Shell had in fact attempted to influence upward and discourage the reduction of prices for gasoline by Jet Car Wash as set out in the charge. The issue before him then became whether these attempts were made by one of the illegal means set out in the section, in this case by means of a threat. The Crown argued that the facts showed that there had been a threat, while the defense argued that Shell had done no more than engage in "business counselling."

Among the factors considered by the court was the evidence relating to conversations between the representatives of Shell and the Jet Car Wash:

"It would not be illogical to conclude that an assistant manager speaking to someone in authority from Shell Canada Products Limited, the supplier of all of the products sold by the Jet Car Wash, might fear alienating that company and somehow



prejudice a relationship if she had done something wrong. In the legal sense then, Doreen Zachar was threatened by Mr. Lettner."

And later:

"In speaking to Mr. Brent and using such terminology as acting irresponsibly and telling him to get the price back up in the face of Mr. Brent having a favourable but easily terminable lease cannot be construed as anything other than a threat within the meaning of the Competition Act."

In sum then, he reached this conclusion:

"To bring to management attention the implication of lowering prices may be informative in some circumstances, but in the context of this case, based upon these factual circumstances, Shell Canada Products Limited went about it in violation of the section and are guilty of contravening the section."

His Lordship also noted evidence which satisfied him that it was clearly in Shell's corporate interest to avoid any price war that the low prices of Jet Car Wash may have brought about in the Winnipeg market.

Shell was not only a major supplier to Jet Car Wash and other dealers, but it was also a competitor through its own retail outlets in Winnipeg. The facts of this case lead to this conclusion: In a market where price cutting by one dealer may set off a price war, successful attempts to influence that dealer's pricing may be just as effective in stifling competition as an industry-wide pricing agreement.

The fine of \$100 000 imposed in this case is equal to the record fine for a similar offence. The case is now under appeal. Shell Canada is appealing the conviction and the fine and the Crown is appealing the level of fine.



# Speech



Consumer and  
Corporate Affairs Canada

Consommation  
et Corporations Canada

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## MERGER REVIEW UNDER CANADIAN COMPETITION LAW:

### THE QUEST FOR BALANCE

NOTES FOR AN ADDRESS

TO THE

CANADIAN BAR ASSOCIATION

BY

CALVIN S. GOLDMAN, Q.C.

DIRECTOR OF INVESTIGATION AND RESEARCH

BUREAU OF COMPETITION POLICY

VANCOUVER, AUGUST 23, 1989





My remarks today will focus on merger review under the Competition Act of 1986. I want to comment on the effectiveness of the merger provisions and our approach to their administration -- as demonstrated by the record of the first three years of the Act's existence.

People who think carefully about merger review realize that the writing and administration of competition legislation is, like tightrope walking, primarily an exercise of balance.

Effective competition legislation balances two broad economic interests that are particularly important at this point in Canada's history. We need to ensure that competition is protected in Canada and, at the same time, we need to enhance our international competitiveness in the face of increasingly global markets.

The experience of the past three years demonstrates that the Competition Act is well suited to this delicate balancing task. Indeed, the purpose clause of the Act makes it clear that the legislation is designed to achieve a number of objectives. The balancing of these sometimes conflicting objectives is an integral part of the manner in which we approach the administration of various sections of the legislation.

This is particularly so in our analysis of certain types of mergers where both domestic and international competition issues arise. In these merger cases, effective

resolutions are those which attempt to strike a balance between these two broad economic interests.

Balanced merger resolutions begin with a weighing of various factors. The statute allows us to take into account both the positive and negative competitive effects of the transaction. The Act requires us to look beyond strict market shares and concentration ratios and to examine a host of qualitative factors. These include foreign competition, substitute products, barriers to entry, effective competition remaining and failing firm issues. In the real world, merger proposals are not always, or even usually, all good or all bad. Some of the effects of a proposed merger can be desirable -- for example where a merger allows an enterprise in Canada to compete on equal terms with a large foreign rival not only in Canada but also in international markets.

These features may, and often do, co-exist with features which negatively impact on competition in the domestic market. In passing the Competition Act of 1986, Parliament recognized that the public interest is best served when we are able to find an evenhanded resolution to these situations.

### Alternative Case Resolution Techniques

In addressing mergers that give rise to both positive and negative effects, the Act provides my Office with

discretion as to the choice of remedy. Indeed the statute does not require the Director to bring every or any particular anti-competitive case to the Competition Tribunal for adjudication. Rather, flexibility of response is provided through the availability of several alternative resolution techniques. This flexibility greatly assists our ability to achieve balanced resolutions in complex merger cases.

In addition to filing a contested application before the Tribunal, mergers may be addressed by the following vehicles: advance ruling certificates, advisory opinions, pre-closing restructuring or "fix it first" resolutions, and undertakings for post-closing restructuring. Another option is to monitor events for the three year period after closing, while retaining the power to take action in that time if the actual effects of the merger so warrant. The analysis of the prospective effects of many mergers is a complex task, and where there is uncertainty as to the likely effects of the merger, particularly where markets are in significant transition, the monitoring mode has proved to be a viable alternative. We also have at our disposal a particularly useful instrument -- the consent order -- which I will come back to in a moment.

We are using all of these remedies in our ongoing efforts to ensure that the legislation is administered and enforced in an effective manner. In this regard, our compliance-oriented and open-door approach has proven to be



of great benefit in the resolution of merger cases particularly where most businesses are prepared to try to resolve issues under the Act in a relatively early and expeditious manner.

To be locked into contested litigation as your only or usual response to every problem would be to foreclose the possibility of reaching balanced merger resolutions in most instances. Although litigation is a valuable tool that you always want to have at your disposal, it is a blunt instrument and one to be used selectively. To begin with, it is costly in terms of time and money. In addition, the results of embarking upon litigation cannot usually be predicted with certainty -- any experienced lawyer knows that. More importantly, it is an instrument which can frustrate many merger proposals from the outset.

As we have learned since 1986 -- and other countries have had the same experience -- a potential public challenge, using the full adversarial process, is often enough to cause a merger to be abandoned. The prospect of having to divulge sensitive business plans and strategies in a public setting where corporate officers are subject to cross-examination is unacceptable for most companies. In many cases, this prospect alone is enough to stifle the proposal. And we have, in fact, seen a number of merger proposals abandoned wholly or partly because the parties did

not want to embark on contested proceedings in order to try to proceed with their original proposal.

There will be situations in which contested litigation is necessary. A proposed merger may be so totally lacking in redeeming features that nothing less is appropriate. But, from our experience in Canada, this will be the exception rather than the rule. If the only way to deal with every imperfect proposal is litigation, then mergers, which could be made legally unobjectionable with relatively expeditious modification, would be stopped cold -- and some may well have been efficiency enhancing. The positive aspects, particularly in relation to international competitiveness, would be stifled along with the negative. This counter-productive rigidity is fortunately avoided in the legislation that Parliament passed in 1986 as well as in its administration.

Because of the potential significance of a decision to challenge a proposed merger, we recognize that merger reviews must be conducted as thoroughly, professionally and carefully as possible. Since we often have to review many different mergers in relatively short time frames, we make extensive use of outside industry and economic expertise to assist the Bureau's professional staff in ensuring there is an accurate and realistic assessment of the likely effects of the merger.

### Examples of Case Resolutions

We have made use of the full range of techniques to achieve resolutions which strike a balance between the two basic goals I have mentioned. In so doing we have repeatedly made it clear that we have no hesitation in challenging mergers in relation to their harmful effects upon domestic competition. But we only do so where the statutory threshold of a substantial lessening or prevention of competition is met. Let me briefly mention some examples:

1. One of the first pre-closing "fix-it-first" resolutions achieved was the proposed takeover by Nabisco Brands Ltd. of certain assets of the Interbake Foods division of Weston Foods Ltd. Our review covered a variety of factors including the influence of foreign competition and barriers to entry. We informed the two companies that the merger as initially proposed would lessen competition substantially in the cookie and cracker markets, and that if they went ahead with it in that form, it would be challenged before the Tribunal. In response they came up with a modified plan. Nabisco would acquire only those Interbake brands which made up a majority of its export sales. Interbake would find an alternate buyer for the remainder of the assets.

With these changes, the objectionable features of the transaction disappeared while the aspects that facilitated the attainment of increased international competitiveness were retained. Only then was the merger allowed to proceed unchallenged.

The alternate buyer, as it turned out was a Canadian company which is much smaller than either Nabisco or Weston. This illustrates a further advantage of the compliance-oriented process -- the generation of a new opportunity for small and medium-sized business, a matter also addressed in the purpose clause (s.1.1) of the Act.

2. A second resolution involved the proposed acquisition by Canada Safeway Limited of certain assets of Woodward Stores Limited. We made it clear that this transaction would be challenged because of its impact on competition in six urban markets in Alberta and British Columbia. Safeway responded with an undertaking to divest itself of 14 supermarkets in the affected markets. And smaller enterprises have managed to purchase many of those supermarkets in order to attain entry into the market. The resolution, I might add, was endorsed by the Consumers' Association of Alberta.

3. A further example arises from the Hostess/Frito-Lay partnership. We informed the parties in 1988 that the proposed transaction in its original form would likely lessen competition substantially in the salted snack food market. In addressing our concerns, they restructured the transaction so as to divest a plant, trucks and equipment and the rights to seven brands to a third party: Murphy Snack Foods. Once again a new opportunity for a smaller enterprise in Canada was created as a result of the opera-

tion of the Act. This resolution received overwhelming support from major retailers, wholesalers and distributors in the industry across the country. And some of those retailers also have provided Murphys with that essential ingredient to compete in that industry -- shelf space.

4. The acquisition in New Brunswick by Baxter Foods Limited of McKay's Dairy Limited was abandoned recently as a consequence of our announced intention to challenge the proposal before the Tribunal. Indeed, the end result was pro-competitive since Baxter Foods subsequently sold McKay's Dairy to Perfection Foods Limited, a smaller dairy in New Brunswick.

5. Asea Brown Boveri Inc.'s proposed acquisition of various assets of Westinghouse Canada Inc. was a merger that involved a settlement subsequent to the public announcement earlier this year of my intention to challenge the transaction before the Tribunal. That merger and the merger of the computer reservation systems of Air Canada and Canadian Airlines International (the Gemini case), which I also initially contested through extensive litigation, were settled on the basis of precedential consent orders.

We used the consent order remedy with respect to the ABB/Westinghouse transaction to obtain what we consider to be a balanced settlement in relation to the market for electric power transmission and distribution facilities.



This was a particularly complex situation in which simplistic approaches would not have worked. To achieve the dual goals I have mentioned, we needed, in this case, a resolution that took into account a variety of domestic and foreign competition considerations.

We were able to achieve such a balance because the Act allowed us to consider real world economic factors. They included the impact that both the Free Trade Agreement and ABB's commitment to seek a combination of tariff remission and accelerated tariff reduction would have in reducing barriers to entry and facilitating increased foreign competition. The consent order enables us to ensure that domestic market power will be constrained by foreign competition; at the same time it encourages innovative activity in Canada and fosters the attainment of efficiencies that will allow ABB to better compete in foreign markets.

And here is an additional point to note: despite the intricacy of the transaction, from the filing date of the proposed consent order before the Tribunal to the issuance of the order, the resolution took only seven weeks -- including just a half-day of hearings during which counsel for this Office responded to comments made by market participants. This was the first case in which a consent order was issued by the Tribunal.

6. Another milestone was the Gemini case. In that case, contested litigation had already proceeded for about a year before the proposed consent order was agreed to and submitted to the Tribunal. I characterize the case as a milestone because the Tribunal, in granting the consent order, clarified its role with respect to the issuance of such orders, thereby providing important guidance for my Office and merging parties.

The Tribunal made it clear that although its role is not to rubber-stamp proposed orders, neither is it given a mandate to craft the best possible terms and conditions for protecting competition. The Tribunal referred to the Ontario Supreme Court's decision in the recent Sparling case where the Court recognized (under a different federal statute) that "settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected."

The Tribunal said that its role is not to ask whether the terms of a consent order represent the optimum solution to a given problem, but is rather to determine whether the consent order meets a minimum test of ensuring that there will be no likelihood of a substantial prevention or lessening of competition. The Tribunal also indicated its willingness to consider behavioural type orders in certain circumstances.

The practical effect of the Gemini and ABB decisions, of course, is that everyone involved in merger proceedings now understands that embarking upon the consent order route will not necessarily lead to protracted litigation, but instead should be a relatively expeditious and straightforward process.

The use of consent orders as an alternative to contested litigation in merger cases and other cases under the Act has proved to be an effective instrument. In addition to merger cases, we have seen precedential consent orders issued by superior courts in relation to the resolution of the real estate industry cases last December and earlier in relation to the two county law association cases. We expect to make increasing use of the consent order process in appropriate cases in the future. One such proposed consent order is currently before the Tribunal in the Imperial Oil/Texaco merger.

Although I am focusing today on mergers, I think it's useful to point out that the Competition Act contains other provisions which complement the merger provisions -- including those covering abuse of dominant position. During or even beyond the three-year period, if it becomes evident that the new, merged entity is engaging in anti-competitive behaviour, those provisions can be invoked to obtain an appropriate remedy, including stopping the practice in question. Indeed, Parliament has specifically provided in

two sections of the Act that the Director cannot bring an application under both the abuse of dominance and merger provisions on the basis of substantially the same facts, which reflects the dual remedies available to my Office in some instances. I might add that we have recently filed the first application before the Tribunal seeking a remedial order under the abuse of dominance provisions. This application relates to the activities of NutraSweet Company in the Canadian aspartame (artificial sweetener) market.

#### International Competitiveness

I want to return more directly to the subject of merger review under the Act. The above merger cases illustrate our willingness to take action where warranted and to the extent necessary to protect competition in the domestic market, while at the same time, continuing to have regard to the desirability of increased international competitiveness of firms in Canada.

Canada is one of the first industrialized nations to have a competition law that recognizes the importance of a firm's need to restructure to achieve efficiency gains, and the role of such gains in bringing about increased exports or import substitutions. These provisions and others in the legislation reflect the role that international economic factors may play in the assessment of merger cases.

Let me return to the purpose clause of the legislation. It states that the Act is specifically designed to maintain and encourage competition in Canada, in order to, among other things, promote the efficiency and adaptability of the Canadian economy, and the expansion of opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada.

The same theme is present in the merger review provisions. The statute states that a determination that a merger substantially lessens competition cannot be based solely on evidence of concentration or market share. The statute also directs our attention to the role of foreign competition, dynamic change and barriers to international trade. Thus, the statute requires us to look beyond domestic market share alone in assessing a merger.

There have been several cases in which the types of factors mentioned above have been important. I will summarize some of them very briefly:

1. The acquisition by Fletcher Challenge Limited of British Columbia Forest Products Limited was not challenged, in part, because of the availability of alternative, foreign sources of supply, including sources in the United States.

2. Similarly in the Amoco Canada/Dome Petroleum merger, the decision not to challenge was based in part on the constraining influence of international market forces on competition in relation to natural gas liquid products.



3. Another example is Nova Corporation's acquisition of Polysar, a case where we are monitoring the transaction for three years. The Bureau's analysis determined that the markets for petrochemical derivative products were North American in scope and highly competitive. The Free Trade Agreement is expected to further enhance competition in relation to these products.

Even when actual or potential foreign competition is not sufficient to prevent the conclusion that a merger has lessened competition substantially, section 96 provides that an assessment be made to determine if the merger should proceed on the basis of the magnitude of anticipated gains in efficiency that will be brought about. Section 96 provides that a merger shall not be blocked if it is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result, and if the gains would not otherwise likely be attained. In assessing efficiency gains, the Act requires that specific consideration be given to those gains that are likely to result in an increase in the value of Canadian exports or the substitution of domestic for imported products.

Cases in which efficiency gains played a role have included the acquisition by Fletcher Challenge of B.C. Forest Products Limited; the acquisition of Fruehauf Canada Inc. by the Trailmobile Group of Companies Ltd; the acquisi-

tion by Dofasco Inc. of the Algoma Steel Corporation; and the recent acquisition by Consumers Packaging of Domglas where anticipated efficiency gains were confirmed by an independent expert to be in the order of \$53.9 million a year. Those gains should permit the parties to better meet foreign competition both in Canada and in the U.S.A.

The potential effects of foreign competition and the anticipated reduction of barriers to trade were important considerations in the decision last month not to challenge the Molson/Carling merger at this time. The beer industry is undergoing dynamic changes in many areas of Canada. The parties have informed my Office that they intend to provide access to the Molson distribution system in Quebec under certain circumstances. We will be monitoring these developments during the three year period provided under the Act with particular attention being paid to the beer markets in Quebec and Alberta. The parties also expect to achieve considerable efficiency gains as a result of the merger which will assist their competitive position internationally.

#### Public Information

Finally, I want to mention an aspect of the administration of the law which contributes significantly to its effectiveness. From the day the new Act came into effect, three years ago, we have given high priority to public

information -- to getting word out to the public about the new legislation and about our approach to its administration.

We treat this not as a peripheral activity but as an indispensable, central part of the process. Sound corporate management and business growth depend on a full understanding of all the factors that impinge on a business plan. Furthermore, business and the public in general need a full understanding of competition law in order to assess its implications intelligently and to participate effectively in the process.

For these reasons, we make every effort to put as much information on the public record as possible, while respecting the statutory requirements for confidentiality. Once again a balanced approach is required -- one that ensures that the public is well-informed but also ensures that the sensitivity of certain business plans is maintained.

For example: when the PWA/Wardair decision was reached, we issued a news release with an eight-page backgrounder which related the decision to various provisions of the Act. In examining that transaction, we focused on the failing firm factor and the backgrounder highlighted our approach to this issue. Earlier in the process, the public was kept fully informed about other developments -- for instance, about our insistence that Wardair first shop

around for an alternative purchaser, a search which proved ultimately to be unsuccessful.

In announcing our decision to permit the Molson/Carling merger to proceed subject to monitoring, we issued an extensive news release and a backgrounder, explaining in detail the examination and relevant conclusions.

A transaction which has attracted particularly wide public interest is the Imperial Oil/Texaco merger. I announced at the outset that I would place any divestiture package that emerged before the Tribunal. Last June 29th, I filed an application before the Tribunal for a consent order. In addition to the lengthy documents filed, which are on the public record at the Tribunal, the Bureau issued a detailed news release, an 18-page background paper, and four accompanying schedules. We have since filed a comprehensive competitive impact statement with the Tribunal -- which, of course, is also on the public record. Detailed affidavits of experts for the Director in this matter also have been filed as have other written submissions.

Technical briefings were also provided to the media at the time of the announcement of the Imperial Oil and Molson decisions in order to explain the rationale for our position in these complex mergers.

On this matter of public information, as in so many others, we have a critical balance to strike. On the one hand there is the need -- in fact the requirement -- to

protect commercially sensitive information such as business plans, under the confidentiality provisions of the Act. On the other hand there is the need -- so important in terms of trying to achieve increasingly smooth and effective administration of the law -- to keep business, the legal profession and, indeed the public at large, adequately informed about the resolution of specific cases and about the general approach taken by this Office. In our efforts to achieve the optimum balance, we have consulted closely with the federal Department of Justice and with the private sector on the extent to which we can and should provide information to the public on merger decisions. Indeed, discussions on this subject were commenced with members of the private sector at the first meeting of the Director's Consultative Forum in 1987, and have continued through various consultative meetings earlier this year. A number of steps we have taken recently to enhance the public information side of the merger review process are discussed in a speech I gave in Toronto in May of this year, for those who may want to pursue this subject.

Further to our objective of providing more information to the public, we initiated the use of news releases and backgrounders which have increasingly become more detailed in relation to merger cases of public significance. We have also initiated the publication of a series of information bulletins; the third bulletin was released two months ago,



after extensive private sector consultations, regarding the Director's Program of Compliance. We have developed special information packages to address questions about new developments, such as notification requirements pre-closing.

And we have used speeches like this one to communicate -- not only with this audience -- but through publication and distribution in many instances, with a larger audience beyond it. Our goal has been to ensure that accurate information and responses to questions are provided to various interested audiences and accordingly, a rather demanding speaking schedule has been maintained over the past three years. For example, since the Competition Act extends well beyond the subject of merger review, our activities in those other areas can be found in the "Track Record" speech given earlier this year in Calgary.

Last but not least, there is the comprehensive Annual Report to the Minister, tabled before Parliament each year as a statutory requirement. The report now contains a new, more readable format, with an overview of the activities for the year, and a specific chapter on mergers.

### Conclusion

To sum up: The record of the first three years of the Competition Act in Canada demonstrates that balance is being achieved in a number of important respects. We believe that

competition in Canada remains healthy in an environment of increased international competitiveness; and confidentiality of sensitive business plans is being preserved while the public is being kept even more informed about the administration of the legislation.

This is being achieved because the Competition Act of 1986 is a state-of-the-art legislative instrument. In this regard, some of our counterparts in the antitrust agencies of several other industrialized countries are examining the Competition Act in the process of updating their own legislation. This is also being achieved because of the commitment, effort and team work of so many people in the Bureau of Competition Policy who have faced an exceptionally demanding workload over the past three years. Since the Act was passed, we have worked continuously to make the administration of competition law in Canada as effective as possible.

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## THE IMPACT OF THE COMPETITION ACT OF 1986

NOTES FOR AN ADDRESS

TO THE

NATIONAL CONFERENCE ON THE CENTENARY OF COMPETITION LAW

IN CANADA

BY

CALVIN S. GOLDMAN, Q.C.

DIRECTOR OF INVESTIGATION AND RESEARCH

BUREAU OF COMPETITION POLICY

TORONTO, OCTOBER 24, 1989





## Introduction

In early September, The Economist carried an article on U.S. antitrust enforcement in today's world marketplace. In the course of the article the suggestion was made that their antitrust laws needed to be amended to recognize the changes in their economic environment. The article went on to say that it is "easy to say that America's antitrust laws should be updated, but hard to do." Those of you familiar with the Canadian experience in designing and updating our own competition law and policy would no doubt agree wholeheartedly with such observations in a generic sense.

Nevertheless, we in Canada have succeeded in completing a difficult task that other nations are continuing, or are only beginning to tackle. The Canadian Parliament, in 1889, was the first national government to implement laws addressing antitrust infractions. One could describe the subsequent 97 year period up to 1986, as a strenuous path to reform. Indeed, the Competition Act passed in 1986 was, itself, the culmination of almost twenty years of concerted effort by our legislators. In the period since 1986, I think it is fair to say that a quiet revolution has taken place in the protection of competition in this country.

This revolution has come about partly because of the nature of the Competition Act itself -- it is a modern and realistic framework for addressing antitrust issues -- and



partly because of the approach the Bureau of Competition Policy has adopted to enforce the legislation.

The design objective in the drafting of the Competition Act was, in a word, balance. The legislators set out to write a law that would effectively discourage and prohibit practices which harm competition. But they also recognized the need to do so without placing crippling constraints on Canadian industries' ability to compete in international markets.

Important themes reflected throughout the Act -- efficiency, adaptability and international competitiveness -- recognize the realities of the Canadian economy. It is an economy characterized by smaller companies relative to most other industrialized nations, high levels of market concentration in small, geographically-segmented domestic markets, and businesses which may require an opportunity to rationalize production to be competitive in offshore markets.

Given these fundamental characteristics, effective competition legislation must balance two broad economic interests that are particularly important at this point in Canada's history. We need to ensure that competition is maintained and encouraged in domestic markets and, at the same time, we need to enhance our efficiency and our international competitiveness. The experience of the past three years, which I will highlight for you today,

demonstrates, I believe, that the Competition Act is well suited to this delicate balancing task.

In the context of today's program, I do not intend to talk about the administrative changes in the Bureau which we have spent a good deal of time on and which I have discussed on earlier occasions. Simply put, we undertook these changes to ensure that we were operating as efficiently and effectively as possible to meet the objectives of the Act.

### **The Compliance-Oriented Approach and Merger Review**

The Act allows for the use of a variety of techniques to resolve competition concerns short of litigation in both criminal and reviewable matters. Accordingly, by its nature, our present legislation permits the Bureau to adopt what we have termed our "compliance-oriented approach" to the enforcement of its provisions. We have concentrated our efforts in two ways: firstly, in the promotion of continuing voluntary compliance; and, secondly, by relying on a broader range of responses to non-compliance. By effectively addressing appropriate cases in this manner, the Bureau is able to focus its resources on cases of greater potential economic significance, consumer benefit or deterrent effect. Clearly, initiating contested proceedings is not the answer in many situations, and particularly not when alternative means are available to provide equally effective, more timely and less costly resolutions.

Just as in the medical profession where it is a lot more efficient and effective to practice preventative medicine than to always embark on surgery -- similarly preventative compliance may obviate the need for costly and time-consuming litigation -- but we will certainly go to litigation if necessary.

Over the past three years, we have maintained an open door policy to encourage an ongoing exchange of views and to increase the level of compliance with the legislation. This aspect of our compliance-oriented approach is working to the point now that our two boardrooms are regularly visited by representatives of the private sector regarding case matters.

The availability of alternative resolution techniques has been particularly useful in working the anticompetitive features out of merger proposals. The Bureau's compliance-oriented approach to merger review, with its emphasis on "fix-it-first" restructuring, has proved to be of great benefit in meeting the objectives of the Competition Act. Moreover, the flexibility of this approach is well suited to particular merger review issues in the present environment where many businesses in Canada are having to meet the new challenges of increasingly globalized trade and increased international competition.

Two of the most direct ways in which we attempt to facilitate compliance with the merger law are the provision

of advisory opinions on proposed mergers and the issuance of advance ruling certificates.

These instruments allow the parties to a merger to come to the Bureau of Competition Policy at the proposal stage, to learn in advance how we are likely to view its effects on competition. If the proposal is one that will not likely substantially prevent or lessen competition, an advance ruling certificate may be issued which allows the merger to proceed with statutory comfort. If the proposal cannot meet this test, the parties may be provided with an advisory opinion that highlights either our present concerns or possible future concerns.

Another pre-emptive feature is the requirement for pre-closing notification. Above specified thresholds of value, companies planning to merge must tell us in advance. Pre-closing notification enables us to examine the transaction before it is completed to determine whether it raises an issue under the Act. Whether or not a proposed merger is notifiable, we certainly encourage business to consult with us well in advance of the closing date to determine if an issue is likely to arise under the Act. The Act applies to mergers of all sizes, whether or not the transaction is notifiable.

If the future effects of a merger are not sufficiently predictable, we may decide to monitor the results of the merger. The Act gives us three years to move against a

merger if in that time it is determined that it substantially prevents or lessens competition or is likely to do so. At any time in these three years, if negative impacts emerge, we can assess them and take steps to curb them.

Let me digress briefly for a moment to emphasize that the focal point of our merger process is the making of decisions which are fully informed. As a matter of policy we enlist the aid of industry and other outside experts. We seek information from many sources to ensure that we arrive at an accurate, real-world assessment of the likely effects of a merger.

When we are faced with a merger that will likely prevent or lessen competition substantially in Canada, there are several routes we can follow to resolve our concerns short of litigation. Our preferred approach, as I've said, is to "fix-it-first." Typically, this involves a restructuring of the transaction before closing, for instance through divestiture, to remove the undesirable features of the proposal and so remove the basis upon which we could launch a challenge. I should emphasize that restructuring of proposed mergers is only done where the parties themselves take the initiative after we have made our concerns known -- it is their choice. They remain free to decline any such restructuring and have the issues addressed in contested proceedings before the Competition Tribunal.

Where restructuring is not possible before closing, post-closing restructuring can be accommodated. In such



cases, one alternative is to proceed to the Tribunal on the basis of an application for an order on consent approving the resolution arrived at with the parties. In other instances we may allow the merger to proceed without immediate challenge, but subject to an undertaking by the parties involved to take specific action by a specified date to deal with our concerns. Generally, we require those giving undertakings also to consent to an order that may be issued by the Tribunal in the event that the undertakings are not fulfilled. I should note in passing that I have discussed in considerable detail in a speech given earlier this year, at a Law Society of Upper Canada program, the general criteria that pertain to the use of consent orders in these situations. Anyone interested can obtain a copy from the Bureau offices.

In our assessment of the impact of a merger under the Competition Act, our vision tries to be as realistic as possible. The competitive implications of a merger cannot be assessed solely on the basis of industry concentration or the market shares of the participants. Simple quantitative criteria such as concentration ratios are not determinative. The Act requires us to consider a whole range of other "qualitative" factors. These include the extent of effective foreign competition; the possibility of a failing business; the availability of acceptable product substitutes; the existence of any trade, regulatory or other

barriers to entry; the extent of effective competition remaining in the market; whether the merger is likely to result in the removal of a vigorous and effective competitor; the nature and extent of innovation and any other factor that is relevant to competition in a market.

In addition, it is not only the negative effects on competition which are considered in merger review, but also the benefits for the Canadian economy flowing from more efficient industry. An efficiency exception for mergers was incorporated in the 1986 statutory revisions. Mergers are not to be blocked if they bring about gains in efficiency that will be greater than, and will offset, the effects of any lessening of competition resulting from the merger, and if such efficiency gains would not likely be attained if an order blocking the merger were made. In short, the Act requires that we examine a merger from a practical and real-world economic perspective.

This examination of offsetting benefits is an important feature of another aspect of the Act -- the provisions relating to specialization agreements. Such agreements are particularly important to Canada's manufacturing sector because of the relatively large number of small scale plants. Specialization agreements will likely figure prominently in corporate strategies for adapting to markets that are becoming increasingly more global pursuant to GATT discussions. And they may play an important part in the

Canada-U.S. free trade environment. Under the old Act, companies contemplating an arrangement of this kind faced a powerful deterrent. Specialization agreements could have been viewed as violations, perhaps even criminal conspiracies. These agreements now offer an available option to companies that do not want to go the whole extent of a merger to remain competitive in the global marketplace.

## Highlights of Bureau Activities

### A. Merger Cases

I have outlined only a few of the more significant merger and related features of the Competition Act, which should be sufficient to indicate that the legislation definitely represents a step forward in a modern and realistic direction. Since 1986, we have made use of the full range of techniques to achieve resolutions which try to strike a balance between the two goals I have mentioned -- protecting domestic competition and promoting enhanced international competitiveness. And the proof of the law's effectiveness is on the record. I will briefly outline some examples:

1. One of the first pre-closing "fix-it-first" resolutions achieved was the proposed takeover by Nabisco Brands Ltd. of certain assets of the Interbake Foods division of Weston Foods Ltd. Our review covered a variety of factors

including the influence of foreign competition and barriers to entry. We informed the two companies of our view that the merger as initially proposed would likely lessen competition substantially in the cookie and cracker markets, and that if they went ahead with it in that form, it would be challenged before the Tribunal. In response they presented us with a modified plan. Nabisco would acquire only those Interbake brands which made up a majority of its export sales. Interbake would find an alternate buyer for the remainder of the assets.

With these changes, the objectionable features of the transaction disappeared while the aspects that facilitated the attainment of increased international competitiveness were retained. Only then was the merger allowed to proceed unchallenged.

The alternate buyer, as it turned out, was a Canadian company which is much smaller than either Nabisco or Weston. This illustrates a further advantage of the compliance-oriented process -- the generation of a new opportunity for small and medium-sized business.

2. A second resolution involved the proposed acquisition by Canada Safeway Limited of certain assets of Woodward Stores Limited. We made it clear that this transaction would be challenged because of its likely impact on competition in six urban markets in Alberta and British Columbia. Safeway responded with an undertaking to divest

itself of 14 supermarkets in the affected markets. And it is interesting to note that smaller enterprises have managed to purchase many of those supermarkets in order to gain entry into the market or expand their presence.

3. A further example arises from the Hostess/Frito-Lay partnership. We informed the parties in 1988 that the proposed transaction in its original form would likely lessen competition substantially in the salted snack food market. In addressing our concerns, they restructured the transaction so as to divest a plant, trucks and equipment and the rights to seven brands to a third party: Murphy Snack Foods. Once again, a new opportunity for a smaller enterprise in Canada was created as a result of the operation of the Act. This resolution received overwhelming support from major retailers, wholesalers and distributors in the industry across the country. And some of those retailers also have provided Murphy's with that essential ingredient to compete in that industry -- shelf space.

4. The acquisition in New Brunswick by Baxter Foods Limited of McKay's Dairy Limited was abandoned recently as a consequence of our announced intention to challenge the proposal before the Tribunal. Indeed, the end result was pro-competitive since McKay's Dairy was subsequently sold to Perfection Foods Limited, a smaller dairy in New Brunswick.



5. On a much larger scale, Asea Brown Boveri Inc.'s proposed acquisition of various assets of Westinghouse Canada Inc. was a merger that involved a settlement subsequent to the public announcement earlier this year of my intention to challenge the transaction before the Tribunal. That merger and the merger of the computer reservation systems of Air Canada and Canadian Airlines International (the Gemini case), which was initially contested through extensive litigation, were settled on the basis of precedential consent orders.

We used the consent order remedy with respect to the ABB/Westinghouse transaction to obtain what we consider to be a balanced settlement in relation to the market for electric power transmission and distribution facilities. This was a particularly complex situation in which simplistic approaches would not have worked. To achieve the dual goals I have mentioned, we needed a resolution that took into account a variety of domestic and foreign competition considerations. The resolution achieved reflects the kind of interaction we can expect to see more of between trade policy and competition policy.

We were able to achieve such a balance because the Act allowed us to consider real-world economic factors, in other words, to give appropriate weight to the dynamic nature of the market in question. This included the impact that both the Free Trade Agreement and ABB's commitment to seek a

combination of tariff remission and accelerated tariff reduction would have in reducing barriers to entry and facilitating increased foreign competition. The order in effect says that ABB must obtain for the middle category of transformers tariff reductions on an accelerated basis under the Free Trade Agreement, and full tariff remissions for at least five years for the largest category of transformers, failing which divestitures are required. The consent order enables us to ensure that domestic market power will be constrained by foreign competition; at the same time, it encourages innovative activity in Canada and fosters the attainment of efficiencies that will allow ABB to better compete against foreign competition both domestically and abroad.

There is an additional point to note: despite the intricacy of the transaction, from the filing date of the proposed consent order before the Tribunal to the issuance of the order, the resolution took only seven weeks -- including just a half-day of hearings during which counsel for the Bureau responded to comments made by market participants. This was the first case in which a consent order was issued by the Tribunal.

The reasons for the Tribunal's decision in this case were released recently. In those reasons, Mr. Justice Strayer pointed out that a settlement arrangement between the Director and private parties is to be given considerable

weight in the Tribunal's evaluation of a proposed consent order. The Tribunal indicated that it is fully cognizant of the savings in the resolution of matters as opposed to litigation and views such settlements as being in the public interest. I think it is fair to say that those reasons provide support for the merits and potential benefits of our compliance-oriented approach to merger cases.

6. Another milestone was the Gemini case. In that case, contested litigation had already proceeded for about a year before the proposed consent order was agreed to and submitted to the Tribunal. I characterize the case as a milestone because the Tribunal, in granting the consent order, clarified its role with respect to the issuance of such orders, thereby providing important guidance for both the Bureau and merging parties.

The Tribunal made it clear that although its role is not to rubber-stamp proposed orders, neither is it given a mandate to craft the best possible terms and conditions for protecting competition. The Tribunal referred to the Ontario Supreme Court's decision in the Sparling case where the court recognized (under a different federal statute) that "settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected."

The Tribunal said that its role is not to ask whether the terms of a consent order represent the optimum solution to a given problem, but is rather to determine whether the consent order meets a minimum test of ensuring that there will be no likelihood of a substantial prevention or lessening of competition. The Tribunal also indicated its willingness to consider behavioural type orders in certain circumstances.

7. As I have mentioned, the statute states that a determination that a merger substantially lessens competition cannot be based solely on evidence of concentration or market share. The statute also directs our attention to the role of foreign competition, dynamic change and barriers to international trade. There have been several cases in which these types of factors have been particularly important in the decision made not to take action against a merger. I will summarize some of them very briefly:

a) The acquisition by Fletcher Challenge Limited of British Columbia Forest Products Limited was not challenged, in part, because of the availability of alternative, foreign sources of supply, including sources in the United States.

b) Similarly in the Amoco Canada/Dome Petroleum merger, the decision not to challenge was based in part on the constraining influence of international market forces on competition in relation to natural gas liquid products.

c) Another example is Nova Corporation's acquisition of Polysar -- a case where we are monitoring the transaction for three years. The Bureau's analysis determined that the markets for petrochemical derivative products were North American in scope and highly competitive. The Free Trade Agreement is expected to further enhance competition in relation to these products.

8. Even when actual or potential foreign competition is not sufficient to prevent the conclusion that a merger has lessened competition substantially, section 96 of the Act provides that an assessment be made to determine if the merger should proceed on the basis of the magnitude of anticipated gains in efficiency that will be brought about. Section 96 provides that a merger shall not be blocked if it is likely to bring about gains in efficiency that will be greater than, and will offset the effects of any prevention or lessening of competition that will result, and if the gains would not otherwise likely be attained. In assessing efficiency gains, the Act requires that specific consideration be given to those gains that are likely to result in an increase in the value of Canadian exports or the substitution of domestic for imported products.

Cases in which efficiency gains played a role have included the acquisition by Fletcher Challenge of B.C. Forest Products Limited; the acquisition of Fruehauf Canada Inc. by the Trailmobile Group of Companies Ltd; the acquisition by Dofasco Inc. of the Algoma Steel Corporation; and



the recent acquisition by Consumers Packaging of Domglas where anticipated efficiency gains were confirmed by an independent expert to be in the order of \$53.9 million a year. Those gains should permit the parties to better meet foreign competition both in Canada and in the U.S.A.

9. The potential effects of foreign competition and the anticipated reduction of barriers to trade were important considerations in the decision last July not to challenge the Molson/Carling merger. The beer industry is undergoing dynamic changes in many areas of Canada. The parties have informed my Office that they intend to provide access to the Molson distribution system in Quebec under certain circumstances. We will be monitoring these developments during the three-year period provided under the Act with particular attention being paid to the beer markets in Quebec and Alberta. The parties also expect to achieve considerable efficiency gains as a result of the merger which will assist their competitive position internationally.

In summary, I think the above cases illustrate that the Competition Act is designed and able to strike the right balance for Canada -- preserving domestic competition while ensuring Canada remains realistically attuned to the international marketplace.

## B. Other Cases

I have spoken at length about the general character of the Act and in particular about its impact on merger assessment and problem resolution. While merger cases have been prominent and have attracted widespread media coverage, the impact of the new Act has been equally profound in other areas. I will briefly summarize some case examples:

1. In January 1988, the Supreme Court of Ontario issued an order of prohibition under the Competition Act against the two law associations of the Ontario counties of Kent and Waterloo and various executive officers of the two associations. The conduct at issue involved attempts to achieve and enforce agreements on the legal fees members charged the public for residential real estate legal services. Inquiries had been initiated earlier under the conspiracy provisions of the Act. With the co-operation of the two associations, orders were agreed to for presentation to the Court by counsel for the Attorney General of Canada. The strong terms of the orders provided an effective remedy on an immediate basis without the uncertainty and time delay associated with extensive litigation. Actions by the Law Society of Upper Canada to deter similar conduct elsewhere in Ontario will increase the effectiveness of these orders. This case is unique in that it marks the first time that lawyers in Canada have been made subject to orders of prohibition under the competition legislation.

2. In December 1988, the Bureau's compliance-oriented approach to case resolution led to the issuance of a comprehensive order of prohibition by the Federal Court of Canada affecting the real estate industry across Canada. Consumers and industry members had alleged that impediments to competition existed with respect to commissions, services or practices of nine real estate boards in five provinces. After very extensive negotiations, all parties were able to agree to a resolution through the consent prohibition order procedure. That order not only addressed competition concerns about the activities of the nine boards in question, but also, through the Canadian Real Estate Association, applied indirectly to the remaining 105 member boards across Canada. This case is an important example of the compliance-oriented approach generating effective, certain and immediate protection of competition in a manner that is also considerably less costly than contested litigation.

3. Also in December 1988, the first application under provisions of the Competition Act relating to refusal to supply was filed before the Competition Tribunal. The application which was heard last July requests the Tribunal

to order Chrysler Canada Ltd. to supply Chrysler automotive parts to a Montréal firm for export purposes.\*

4. Particularly noteworthy under the reviewable practices provisions of the Act is the application to the Tribunal relating to NutraSweet's activities in the Canadian aspartame market. An inquiry was commenced in October 1988, and the application, which is currently before the Tribunal, seeks a remedial order under the abuse of dominance provisions. This represents the first Tribunal application under these provisions which were introduced in the 1986 amendments.

I think it's useful to point out that the abuse of dominance provisions in the Competition Act may be available in other instances to complement the merger provisions. During or even beyond the three-year merger monitoring period, if it becomes evident that the new, merged entity is engaging in anticompetitive behaviour, these provisions can be invoked to obtain an appropriate remedy, including stopping the practice in question. Indeed, Parliament has

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\* On October 13, 1989 the Tribunal issued its decision in this matter finding that all elements of section 75 of the Act had been proven. An order was issued requiring Chrysler Canada Ltd. to accept Richard Brunet as a customer on trade terms usual and customary to their relationship. The decision also contains important and precedential discussion by the Tribunal regarding the concepts of product and market, the meaning of "substantially affected" and the other elements of section 75 of the Act.

specifically provided in two sections of the Act that the Director cannot bring an application under both the abuse of dominance and merger provisions on the basis of substantially the same facts, which reflects the dual remedies available in some instances.

5. Other precedents have been established under the criminal sections of the Act. Of significance is the conviction, in June 1988, under the bid-rigging provisions of the Act, of four companies in the business forms industry. The conduct in question concerned tendering on provincial government supply contracts. The Saskatchewan Court of Queen's Bench levied fines totalling \$1.6 million (including a \$40 000 fine for a price maintenance offence) -- the largest total fine ever imposed under any section of either the Competition Act or its predecessor, the Combines Investigation Act. The individual fines assessed also were the largest ever levied under the bid-rigging provision. Two of the firms convicted in Saskatchewan, Moore Corporation Limited and R.L. Crain Inc. had been convicted the previous day in Nova Scotia for similar bid-rigging on government contracts and fined \$200 000 each. Orders of prohibition were also imposed by the two Courts against the companies involved and their officers and directors.

6. In a conspiracy case in 1987, major hotels in the Ottawa-Hull area were fined a total of \$420 000 for their concerted activities in relation to the fixing of hotel room



rates to government employees. In addition, the six hotels in question were made subject to an order of prohibition.

7. More recently, the soft drink bottlers in Manitoba, including Coca-Cola Ltd., were fined a total of \$230 000 after pleading guilty to price fixing charges.

8. In December 1987, Epson (Canada) Limited pleaded guilty to 10 counts of price maintenance, or vertical price fixing, and was fined \$20 000 on each count for a total of \$200 000 by the Ontario District Court. This sentence, the highest aggregate ever for price maintenance, is currently under appeal.

9. In February 1989, Toshiba Canada Limited pleaded guilty to two counts under the price maintenance provision and was fined a total of \$65 000; in addition it was made subject to an order prohibiting the continuation or repetition of the offence.

10. In March 1989, Shell Canada was fined \$100 000 on one count following a conviction for price maintenance in the supply of gasoline in the City of Winnipeg. As the Court said in handing down the decision, "a contravention of the Competition Act is serious, and when it has to do with a commodity such as gasoline, affecting almost every citizen, it is even more so." The fine in this case equals the highest per count fine imposed in a price maintenance case.

11. In January of this year, Commodore Business Machines was convicted of four offences under the Act and

fined \$95 000. The offences included discriminating between competing purchasers in the offering of quantity discounts and co-operative advertising support for which Commodore was fined \$25 000 -- the highest ever imposed by a Canadian court for this offence.

12. There have been a number of major cases relating to misleading advertising and deceptive marketing practices. Simpsons Ltd. was convicted of misleading representations concerning a promotional contest and fined \$100 000. A number of companies and individuals including certain entertainment figures were convicted of misleading weight loss representations in Quebec and fined a total of \$75 000. Also, an inquiry was commenced into the activities of the Principal Group of Companies which, following the conclusion of the Code Inquiry in Alberta into the collapse of the Group, resulted in charges being laid last July against a number of persons for misleading representations.

13. Other activities in the misleading advertising area involved an increased use of alternative case resolution techniques. Several noteworthy prohibition orders on consent have been issued in a variety of cases, including the following: In May 1987, an order was issued against Sears Canada Inc. concerning representations without adequate and proper testing of the all-weather traction capabilities of their tires. In January 1989, an order was issued against Cummins Diesel of Canada Limited for comparative performance claims made relating to the durability of

their diesel engine parts, and in March 1989, an order was issued against International Exteriors Ltd. for claims relating to the durability and energy saving attributes of their metal roofing product. In September 1989, Sanyo T.V. was the subject of an order relating to the representation of the place of manufacture of their television sets.

A more selective enforcement approach has also proved successful in this area. While the number of convictions for misleading advertising has shown a small decline, concentration on cases of more serious detriment to consumers has resulted in a significant increase in total fines levied. In fact, this may also reflect a growing willingness on the part of the courts to see to it that anticompetitive behaviour simply will not be tolerated. In the past three years, average fines have risen to more than \$13 000 -- the highest level in history and well above the average fine of slightly more than \$6 000 in 1985-86.

There are also a number of other criminal cases presently before the courts, including charges of conspiracy and price maintenance. And there are a number of significant major inquiries currently underway especially in the areas of conspiracy, bid-rigging and reviewable matters.

The above cases are examples of our commitment to achieve strategic enforcement of the Act in areas of more significant importance to the economy and consumers. We have been making every effort to allocate our resources in a

fashion designed to bring about as effective results as possible in fulfilment of the Act's objectives.

### International Aspects of Protecting Competition

In another aspect of our work, over the past three years we have been increasingly involved in the international aspects of protecting competition. When two Canadian automotive companies went to the Canadian Import Tribunal alleging that Hyundai Motor Company of Korea was dumping cars in Canada, a formal intervention was launched by my Office. We stressed to the Tribunal the importance of encouraging competition in Canada's automobile industry. We argued that Hyundai had in fact been a positive influence on competition to the benefit of Canadian consumers. The Tribunal's ultimate finding of "no injury" to a large extent reflected our position.

Our Economics and International Affairs Branch has been involved in an increasing number of notifications to and from antitrust agencies in several foreign countries. The bulk of these have involved our United States antitrust counterparts and have, to a large extent, related to merger matters. With increasingly global markets we can see more co-operation among national antitrust authorities to improve our analysis and review of competition matters.

The Bureau's participation in the work of the OECD's Committee on Competition Law and Policy continues to be very

active. The Committee's work is of important interest to us in these days of internationalization of certain markets and parallel business practices and issues.

Many industrialized nations are now engaged in the process of updating their own antitrust law, and we find some of them have keen interest in the Canadian experience. The Competition Act is regarded by some in the international arena as a state-of-the-art instrument particularly in its treatment of merger review. In fact, earlier this month the Canadian merger review experience was one of the keynote papers presented at an OECD symposium for developing countries. And we have seen increased interest with other OECD antitrust counterparts in pursuing bilateral discussions, once again primarily related to the merger review process which is being actively tested in many countries.

### **Constitutional Validity**

My review would be incomplete without touching briefly on two decisions delivered on April 20, 1989 by the Supreme Court of Canada in the City National Leasing and Rocois Construction cases. The Court upheld the Combines Investigation Act as valid federal legislation under the general trade and commerce power and in so doing upheld the private right of action provision enacted in 1976. The Court also noted that in numerous cases the Act had already been upheld under the federal criminal law power. These decisions



confirm that our federal competition law is constitutionally positioned on very solid ground. These decisions have also opened the door to civil actions under the Competition Act for breach of the criminal provisions of the statute.

### **Public Information**

I want to discuss one further aspect of our application of the law which we think contributes significantly to its effectiveness. From the commencement of the Act, three years ago, we have given high priority to public information -- to getting word out to the public about the new legislation and about our approach to its administration.

We treat this not as a peripheral activity but as an indispensable, central part of the process. Sound corporate management and business growth depend on a full understanding of all the factors that impinge on a business plan. Furthermore, business and the public in general need a full understanding of competition law in order to assess its implications intelligently and to participate effectively in the process.

For these reasons, we make every effort to put as much information on the public record as possible, while respecting the statutory requirements for confidentiality. Once again a balanced approach is required -- one that ensures that the public is well-informed but also ensures that the sensitivity of certain business plans is maintained.

For example: when the PWA/Wardair decision was reached, we issued a news release with an eight-page backgrounder which related the decision to various provisions of the Act. In examining that transaction, we focused on the failing firm factor and the backgrounder highlighted our approach to this issue. Earlier in the process, the public was kept fully informed about other developments -- for instance, about our insistence that Wardair first shop around for an alternative purchaser -- a search which proved ultimately to be unsuccessful.

In announcing our decision to permit the Molson/Carling merger to proceed subject to monitoring, we issued an extensive news release and a backgrounder, explaining in detail the examination and relevant conclusions.

A transaction which has attracted particularly wide public interest is the Imperial Oil/Texaco merger. I announced at the outset that I would place any divestiture package that emerged before the Tribunal. Last June 29th, I filed an application before the Tribunal for a consent order. In addition to the lengthy documents filed, which are on the public record at the Tribunal, the Bureau issued a detailed news release, an 18-page background paper, and four accompanying schedules. We have since filed a comprehensive competitive impact statement with the Tribunal which, of course, is also on the public record. Detailed affidavits of experts for the Director in this matter also have been filed as have other written submissions.

Technical briefings were also provided to the media at the time of the announcement of the Imperial Oil and Molson decisions in order to explain the rationale for our position in these complex mergers.

Consultation with the public has been an integral part of the development of our approach to the Competition Act. In 1987, we instituted the Director's Consultative Forum. These are informal roundtables on competition law in which representatives of various business sectors the legal profession and consumers groups get together periodically to exchange views and discuss issues as they emerge. We have had three to date: on the merger review process, on the compliance approach generally, and on measures to more effectively enforce the Act. In the latter Forum in December 1988, the role of private and class actions was discussed, as was the extent to which more prosecutions should be commenced against individuals involved in serious criminal offences under the Act.

In addition to the more formal consultations, a number of smaller scale consultation meetings were held with representatives of specific sectors and industry and other associations. A meeting was held earlier this year with representatives of the food manufacturing industry to discuss market dynamics and issues of concern to that particular sector. Discussions which had commenced at the first Consultative Forum were pursued earlier this year with

various groups concerning the information that the Bureau can and should provide to the public on case decisions. It was generally acknowledged that we should continue to try to increase the information provided to the public on the resolution of particular cases especially in the merger area. This will assist the public to better understand the Act and its administration, and a better informed public will be able to participate more effectively in the process.

Generally, to assist in meeting our objective of providing more information to the business and legal communities and to inform business and the public generally, we initiated the publication of a series of information bulletins. The first of these, released in June 1988, dealt with the merger provisions of the Act. The second, released in December 1988, set out the considerations that may be taken into account in the review of applications for merger-related Advance Ruling Certificates. We also spent considerable time in consultations with the legal community on our draft bulletin on the Program of Compliance, which was released in June 1989. Additional bulletins are planned to address the factors guiding the Bureau's application of selected merger-related provisions of the Competition Act and in relation to discriminatory pricing.

On this matter of public information, as in so many others, we have a critical balance to strike. On the one hand there is the need -- in fact the requirement -- to

protect commercially sensitive information such as business plans, under the confidentiality provisions of the Act. On the other hand there is the need -- so important in terms of trying to achieve increasingly smooth and effective administration of the law -- to keep business, the legal profession and, indeed the public at large, adequately informed about the resolution of specific cases and about our general approach. A number of steps we have taken recently to enhance the public information side of the merger review process in particular are discussed in a speech I gave in Toronto in May of this year, for those who may want to pursue this subject.

And we have used speeches like this one to communicate -- not only with this audience -- but through publication and distribution in many instances, with a larger audience beyond it. Our goal has been to ensure that accurate information and responses to questions are provided to various interested audiences and accordingly, a rather demanding speaking schedule has been maintained over the past three years.

Last but not least, there is the comprehensive Annual Report to the Minister, tabled before Parliament each year as a statutory requirement. The report now contains a new, more readable format, with an overview of the activities for the year, and a specific chapter on mergers.



## Concluding Remarks

Competition, properly protected, is highly desirable and effective. It is a force that generates considerable savings and increased consumer disposable income. It keeps Canadian industries sharp and efficient -- characteristics which are of great importance in the increasingly global economy. It constrains the unilateral or collusive exercise of market power. It preserves a place for small businesses, provides opportunities for new ones, and rewards innovation. When competition is protected, a propelling mechanism of the Canadian economy is protected.

Protecting competition requires the balancing of a number of goals and interests: balancing business and consumer interests; balancing the maintenance of competitive domestic markets with certain industries' desire to restructure in order to compete internationally; balancing the need for well-informed business and public communities, with the need to respect the sensitivity of certain business plans. The Bureau makes every attempt, in its activities, to recognize and strike the appropriate balance in what are often rather challenging and intricate situations.

To sum up: Implementation of the Competition Act over the past three years has presented the Bureau with a new mandate and many new demands. We have handled a number of very large and complex mergers in addition to some rather significant cases in the more traditional enforcement

areas. People in the Bureau have been working very hard to ensure that competition in Canada remains healthy and in step with an environment of increased international competitiveness. In my view, the diligence and professionalism displayed by so many members of the Bureau in these challenging circumstances deserves our recognition.



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**MAINTAINING STRUCTURALLY COMPETITIVE MARKETS:  
CONTROLS OF MERGERS AND JOINT VENTURES**

NOTES FOR AN ADDRESS

TO

THE SYMPOSIUM ON COMPETITION AND ECONOMIC DEVELOPMENT

ORGANIZED BY THE

OECD COMMITTEE ON COMPETITION LAW AND POLICY AND

THE OECD DEVELOPMENT CENTRE

BY

CALVIN S. GOLDMAN, Q.C.

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BUREAU OF COMPETITION POLICY

CONSUMER AND CORPORATE AFFAIRS CANADA

PARIS, FRANCE, OCTOBER 17, 1989







I am pleased to be here today to discuss controls of mergers and joint ventures through competition policy. Canada has, in recent years, gone through an extensive process of overhauling its competition law, a process which culminated with the passage of the Competition Act in 1986. Nearly two decades of study and consultation took place prior to the passage of the Act, involving a thorough assessment of the policies of numerous other countries.

The merger provisions of the Competition Act formed a central part of the reforms which came into place. It's worth noting that some of the factors that were considered in the formulation of these provisions are also concerns of some low and middle-income developing countries. For example, the key role of international trade in fostering economic growth was kept closely in mind in drafting the Canadian legislation. Accordingly, I think that the Canadian experience may be of interest to developing countries which may be currently exploring alternative approaches in this area.

#### The Current Merger Wave

This is a particularly interesting time to be discussing mergers\* and joint ventures in an international

\* In this paper the term "mergers" includes acquisitions.

forum like this one because of the merger wave which has been taking place in a number of countries around the world. In Canada, major mergers in the petroleum, brewing and airline industries within the past year have raised broad public interest. The same can be said of certain recent large mergers in the United States, United Kingdom and the Federal Republic of Germany.

The reasons for this merger wave are many and varied. Perhaps the most fundamental cause is the lowering of trade barriers world-wide, through the GATT and other means, over recent years. This has increased international competition and led to the globalization of markets, thereby forcing firms to restructure to remain competitive. Specialization and longer production runs giving rise to economies of scale are now prevalent objectives.

Leveraged buyouts (LBOs) have also played a causal role, but of lesser significance, in the recent merger wave. Another cause which has been suggested by some economists is that the stock market crash of 1987 led to cash-rich companies buying companies that were selling at bargain-basement prices. Others have pointed to the government policies of privatization and regulatory reform, claiming that mergers and acquisitions have taken place as companies position themselves for, or respond to, more competitive operating environments.

### The Importance of Competitive Markets

At the same time as the merger wave, there have been developments toward a fundamental shift in viewpoint. Around the world, there has been an increased recognition of the desirability of market-driven approaches to the fostering of economic growth and structural change. This is evidenced by the greater reliance on market mechanisms in a wide range of countries, both developed and developing. For many of these countries, this shift represents a significant reorientation of their economic system. This is particularly clear in certain Eastern Bloc countries like Hungary.

This trend reflects the numerous benefits of competitive markets. From the perspective of consumers, including those who are less affluent, competition is a force that generates considerable savings and increased disposable income. It also keeps industries sharp and efficient -- characteristics which are of great importance in the increasingly global economy. Competition constrains the unilateral or collusive exercise of market power. It preserves a place for small businesses, provides opportunities for new ones, and rewards innovation. In short, when competition is protected, a propelling mechanism of the economy is protected.

## The Role of Merger and Joint Venture Policy

Given the importance of promoting and maintaining competitive markets, competition policy can clearly play a vital role as a framework policy. Merger and joint venture provisions are a key part of this framework; any such framework should recognize the multiple motives and effects of mergers and joint ventures. As I've just noted, mergers can be vital with respect to rationalization, specialization and structural adjustment. An overly restrictive approach to merger and joint venture policy runs the risk of hindering firms as they try to restructure to survive in the global marketplace. On the other hand, there is no question that the anti-competitive effects of mergers and joint ventures can be serious. Indeed, such effects on competitive markets can be as detrimental as those of various collusive practices.

A complicating factor is that, from a broader public policy perspective, considerations may come into play which go beyond those of promoting competition and economic efficiency. This is particularly true of foreign acquisitions. Such considerations may involve social, cultural or political goals.

Institutional Arrangements Relating to the Control of  
Mergers and Joint Ventures

Given the range of policy dimensions which are relevant to mergers and joint ventures, it is important that the institutional framework for their control ensures that these dimensions are given their proper weighting in a clear and objective manner. In accordance with this goal, two key international norms exist with respect to the role of antitrust agencies. First, they generally conduct their assessments on a strictly national treatment basis. Second, investigations and assessments are conducted in an independent and professional manner. I might add that, in some countries, decisions may be reviewed at the ministerial level.

The Canadian institutional framework incorporates these two international norms. As Director of Investigation and Research, I have statutory responsibility for investigative enforcement of the Competition Act. The Director is head of the Bureau of Competition Policy, which provides the staff and professional support for the Director's statutory responsibilities. Within the Bureau is a branch specifically responsible for the merger and joint venture provisions of the Act.

In non-criminal matters like mergers and joint ventures, the Director brings forward cases for adjudication



to the Competition Tribunal. This adjudicative body, which was legislated into existence at the same time as the Competition Act in 1986, is composed of four judges and up to eight non-judicial members. This blend of judicial and non-judicial members is aimed at ensuring due process and impartiality while at the same time having adjudicators who are very familiar with the applicable disciplines such as commerce and economics.

Another dimension of the Canadian institutional framework is the role of Investment Canada, the agency responsible for the review of foreign investment. This agency is concerned with the broad question of net benefits to Canada, and the impact on competition is just one of the factors considered. While the Bureau of Competition Policy advises on the assessment of this impact, the two agencies and processes are entirely separate and independent. Investment Canada is not bound by our opinion on the competition factor while we are not bound by Investment Canada decisions. The merger provisions of the Competition Act apply even if an acquisition has been approved by Investment Canada.

I should note that separate processes for the review of foreign acquisitions, with emphasis on criteria not strictly related to competition, can be found in other countries as well. In the United States, for example, the Committee on Foreign Investment in the U.S. (CFIUS), an inter-agency

committee, conducts investigations and makes recommendations to the President on the blocking of foreign acquisitions. The President has the authority to prohibit foreign acquisitions of U.S. firms that may threaten to impair U.S. national security.

A final institutional question which I would like to touch on is the role of private actions. In Canada, there is no scope under the Competition Act for private actions with respect to mergers (unless there is an order made by the Competition Tribunal which is subsequently breached). This is also the case in a number of other OECD countries, including France and the Federal Republic of Germany, while the U.S. is a noteworthy exception. It is interesting to note, however, that in Canada private parties may seek recovery of damages suffered as a result of an alleged violation of the criminal provisions of the Act; this does not include mergers and joint ventures.

#### Merger and Joint Venture Policy - The Need for Balance

I would like to turn now from the institutional to the substantive aspects of merger and joint venture policy. People who think carefully about this topic realize that the writing and administration of merger and joint venture policy is, like tightrope walking, primarily an exercise of balance. Effective competition legislation balances two

broad economic interests that are particularly important at the present time. It must ensure that competition is protected domestically and, at the same time, keep the domestic economy realistically attuned to the international marketplace.

In my view, the Canadian experience of the past three years demonstrates that the Competition Act is well suited to this delicate balancing task. Accordingly, I'd like to discuss the Canadian approach in some detail.

The purpose clause of the Competition Act makes it clear that the legislation is designed to achieve a number of objectives. It specifies four main objectives, as follows:

- "to promote the efficiency and adaptability of the Canadian economy",
- "to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada",
- "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy", and
- "to provide consumers with competitive prices and product choices".

The balancing of these sometimes conflicting objectives is an integral part of the manner in which we approach the

administration of the legislation. This is particularly so in our analysis of certain types of mergers where both domestic and international competition issues arise. In these merger cases, effective resolutions are those which attempt to strike a balance between the two broad economic interests which I cited above.

Balanced merger resolutions begin with a weighing of various factors. The basic test which must be met before a remedial order can be made by the Competition Tribunal is whether a merger prevents or lessens or is likely to prevent or lessen competition "substantially". However, the statute allows us to take into account both the positive and negative competitive effects of the transaction. The Act requires us to look beyond strict market shares and concentration ratios and to examine a host of qualitative factors. These include foreign competition, substitute products, tariff and non-tariff barriers to entry, effective competition remaining and failing firm issues. In the real world, merger proposals are not always, or even usually, all good or all bad. Some of the effects of a proposed merger can be desirable -- for example where a merger allows an enterprise in Canada to compete on equal terms with a large foreign rival not only in Canada but also in international markets.

These features may, and often do, co-exist with features which negatively impact on competition in the domestic market. In passing the Competition Act of 1986, Parliament recognized that the public interest is best served when we are able to find an even-handed resolution to these situations.

Of course, other countries have also sought to achieve the balance which I have been discussing, each in a manner consistent with its own objectives and priorities. I won't attempt to outline all of the alternatives to the Canadian approach. However, I would like to briefly mention the role of quantitative factors in assessing competitive impact. Certain OECD countries make explicit use of market share and other quantitative criteria in merger review. The statutory criteria of the Federal Republic of Germany (FRG) and the U.S. Antitrust Guidelines are two notable examples. While this is different from the Canadian approach as I've just described it, one should not exaggerate the importance of this difference. It reflects primarily the relatively high levels of concentration common in many Canadian markets and the consequent special need to ensure that the assessment of mergers involves consideration of a number of factors.



Considerations Other Than the Competitive Impact

To this point, I've focussed mainly on the assessment of factors which are directly and narrowly related to competition. In Canada and a number of other countries, however, the quest for balance which I've been speaking of is achieved at least in part through the consideration of other factors.

In Canada's Competition Act, for example, there is an efficiency exception. This feature of the Canadian merger law is arguably the one which best characterizes the Canadian approach to merger policy. It provides that the Tribunal shall not prohibit a merger or proposed merger if the parties can demonstrate that the merger has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition resulting from the merger, and that the efficiency gains would not likely be attained if an order were made. In recognition of the importance of foreign trade to the Canadian economy, the Act also explicitly directs us to consider whether such efficiency gains would result in significant increases in the real value of exports or in significant import substitution.

Accordingly, Canada's merger law can be briefly described as relying on a competition test with an efficiency exception. The situation in the U.S. is essentially

similar, although in that country efficiency gains are a factor to be considered under the Justice Department Guidelines rather than a specific statutory exception. In some other countries, notably France and the United Kingdom, a broader public interest test is employed; this necessitates a case-by-case assessment of a range of factors not exclusively related to competition.

### Alternative Case Resolution Techniques

The manner in which cases are resolved can be crucial in determining the overall effectiveness of a merger policy. In addressing mergers that give rise to both positive and negative effects, the Competition Act provides my Office with discretion as to the choice of remedy. Indeed the statute does not require the Director to bring every or any particular anti-competitive case to the Competition Tribunal for adjudication. Rather, flexibility of response is provided through the availability of several alternative resolution techniques. This flexibility greatly assists our ability to achieve balanced resolutions in complex merger cases.

In addition to filing a contested application before the Tribunal, mergers may be addressed by the following vehicles: advance ruling certificates, advisory opinions, pre-closing restructuring or "fix it first" resolutions, and

undertakings for post-closing restructuring. Another option is to monitor events for a three-year period after closing, while retaining the power to take action in that time if the actual effects of the merger so warrant. The analysis of the prospective effects of many mergers is a complex task, and where there is uncertainty as to the likely effects of the merger, particularly where markets are in significant transition, the monitoring mode has proved to be a viable alternative. We also have at our disposal a particularly useful instrument -- the consent order -- as I will illustrate later on.

We are using all of these remedies in our ongoing efforts to ensure that the legislation is administered and enforced in an effective manner. In this regard, our compliance-oriented and open-door approach has proven to be of great benefit in the resolution of merger cases, particularly where most businesses are prepared to try to resolve issues under the Act in a relatively early and expeditious manner.

To be locked into contested litigation as your only or usual response to every problem would be to foreclose the possibility of reaching balanced merger resolutions in most instances. Although litigation is a valuable tool that you always want to have at your disposal, it is a blunt instrument and one to be used selectively. To begin with,

it is costly in terms of time and money. In addition, the results of embarking upon litigation cannot usually be predicted with certainty. More importantly, it is an instrument which can frustrate many merger proposals from the outset.

As we have learned since 1986 -- and other countries have had the same experience -- a potential public challenge, using the full adversarial process, is often enough to cause a merger to be abandoned. The prospect of having to divulge sensitive business plans and strategies in a public setting where corporate officers are subject to cross-examination is unacceptable for most companies. In many cases, this prospect alone is enough to stifle the proposal. And we have, in fact, seen a number of merger proposals abandoned wholly or partly because the parties did not want to embark on contested proceedings in order to try to proceed with their original proposal.

There will be situations in which contested litigation is necessary. A proposed merger may be so totally lacking in redeeming features that nothing less is appropriate. But, from our experience in Canada, this will be the exception rather than the rule. If the only way to deal with every imperfect proposal is litigation, then mergers, which could be made legally unobjectionable with relatively expeditious modification, would be stopped cold -- and some

may well have been efficiency-enhancing. The positive aspects, particularly in relation to international competitiveness, would be stifled along with the negative. This counter-productive rigidity is fortunately avoided in the legislation that the Canadian Parliament passed in 1986 as well as in its administration.

#### Notification Procedures

A system of pre-closing notification of mergers to the competition authorities can clearly play a role in ensuring that cases are resolved in the most appropriate and timely manner possible. In Canada, parties to a merger transaction must notify my office if the proposed transaction exceeds two general types of thresholds. In particular, mergers in which the combined sales or assets in Canada of the parties and their affiliates exceed \$400 million (Canadian) and the value of the acquisition target itself exceeds \$35 million (Canadian) in assets or sales are subject to this requirement. I should stress that the merger review law applies to all types of mergers regardless of size and regardless of any obligation to notify my office before closing.

Many other OECD countries have some form of pre-closing notification system, with a number of them also employing minimum size thresholds. Certain countries rely on optional rather than compulsory systems. This difference may be less



important than it appears to be on the surface since parties are likely to be well advised to notify even if it is optional. Finally, I should mention that some countries, such as the Federal Republic of Germany and Japan, have in place a system of post-closing notification.

### Joint Ventures

I would like to turn now to the topic of joint ventures. Our experience with joint ventures in Canada is that many often expand output and production in the economy, or are useful vehicles for undertaking large capital projects that involve considerable risk. Yet, a complete exemption for joint ventures from the merger law would clearly provide an incentive for parties to restructure anti-competitive mergers to escape the application of the law. Joint ventures could be used to fix prices, allocate markets or eliminate existing or potential competition in the unintegrated activities of the parent corporations.

Canadian law deals with this dilemma in a rather innovative fashion. Due to the economic importance of joint ventures -- especially in the Canadian oil and gas industry -- and their recent prominence in research and development programs and export consortia, a special recognition of the value of joint ventures in the law was considered desirable. Accordingly, the Competition Act creates a limited

exemption from the merger law for joint ventures that are formed for the purpose of undertaking a specific project, or a program of research and development. The main statutory conditions which must be satisfied before a joint venture can qualify for the exemption are:

- the project or program would not have taken place in the absence of the joint venture;
- no change in control of the parent corporations would result from the joint venture;
- all parties to the joint venture enter into an agreement in writing which, among other things, restricts the range of activities that may be carried on by the joint venture and provides for termination upon completion of the project or program, and;
- competition is not lessened except to the extent reasonably required to undertake and complete the project or program.

The overriding principle in the construction of this exemption is to ensure that anti-competitive joint ventures remain subject to the merger law and that parties do not have a significant incentive to restructure transactions to escape the application of the law. For example, if the project or program would have taken place in the absence of

the joint venture, then there is no justification for an exemption. Similarly, the exemption applies only to unincorporated joint ventures. Extending the exemption to incorporated joint ventures could result in anti-competitive amalgamations escaping from the application of the merger law. Finally, this exemption does not apply where a party acquires the assets of a combination. This provision ensures that the substantive merger law applies to the sale of a joint venture's assets upon its termination. It also ensures that joint ventures do not become vehicles that allow for the easy escape of the merger provision.

It should be noted that the Canadian law respecting pre-closing notification provides a broader exemption which covers the great majority of unincorporated joint ventures in Canada. This reflects the relatively limited potential negative consequences of exempting joint ventures from pre-closing notification.

In this context, I should mention as well that the Competition Act takes specific note of the economic motivation for and the beneficial effects of specialization agreements. Two companies, for example, who have both been making Widget A and Widget B may agree that each would make one of the items only, that is Widget A or Widget B, in order to reap the economic benefits of longer production runs. The specialization agreements provision of the Act

(which was, incidentally, inspired by the European experience) confers an exemption from the conspiracy law for agreements of this type. These agreements must be approved and registered before the Competition Tribunal, with notice of any such application to be given to my office. We have not seen significant use yet being made of these agreements but they certainly are an available option to companies that do not want to go to the whole extent of a merger to remain competitive in the global marketplace.

#### The Use of Other Provisions in Connection with Mergers and Joint Ventures

I think it's useful to point out that the Competition Act contains other provisions which complement those specifically governing mergers and joint ventures. If, for example, one or more firms are jointly engaging in anti-competitive behaviour, the provision covering abuse of dominant position can be invoked to obtain an appropriate remedy, including stopping the practice in question. This provision was also one of the more significant amendments in the 1986 statute. I might note that Canada's abuse of dominance provision is conceptually similar to Article 86 of the Treaty of Rome.

The criminal provisions relating to conspiracy in restraint of trade also serve as a complement to the merger

and joint venture provisions. The Competition Act provides for a fine of up to \$10 million (Canadian) and/or a five-year jail term for entering into a criminal conspiracy.

The complementary nature of the provisions dealing with abuse of dominance, conspiracy and mergers is evidenced by the fact that Parliament has specifically provided in three sections of the statute that the same evidence cannot be used to bring an action under more than one of the sections. This reflects the choice of remedies available to my Office in some instances. Parties must be cautious to ensure that discussions held in connection with possible mergers or joint ventures do not raise problems with respect to the abuse of dominance or conspiracy provisions. In general, such difficulties can be avoided through adequate consultation with the Bureau at an early stage in the process.

### Case Examples

In order to illustrate a number of the features of Canada's merger policy and its enforcement which I have been discussing, a brief description of a few noteworthy cases may be worthwhile.

1. One of the first pre-closing "fix-it-first" resolutions achieved was the proposed takeover by Nabisco Brands Ltd. of certain assets of the Interbake Foods



division of Weston Foods Ltd. Our review covered a variety of factors including the influence of foreign competition and barriers to entry. We informed the two companies in 1987 that the merger as initially proposed would lessen competition substantially in the cookie and cracker markets, and that if they went ahead with it in that form, it would be challenged before the Tribunal. In response they came up with a modified plan. Nabisco would acquire only those Interbake brands which made up a majority of its export sales. Interbake would find an alternative buyer for the remainder of the assets.

With these changes, the objectionable features of the transaction disappeared while the aspects that facilitated the attainment of increased international competitiveness were retained. Only then was the merger allowed to proceed unchallenged.

2. A second example arises from the Hostess/Frito-Lay partnership. Hostess is a subsidiary of General Foods Inc. and Frito-Lay is a division of Pepsico Canada Ltd. We informed the parties in 1988 that the proposed transaction in its original form would likely lessen competition substantially in the salted snack food market. In addressing our concerns, they restructured the transaction so as to divest a plant, trucks and equipment and the rights to seven brands to a third party. It is worth noting that a new

opportunity for a smaller enterprise in Canada was created as a result of the operation of the Act. This resolution received overwhelming support from major retailers, wholesalers and distributors in the industry across the country.

Both the Hostess/Frito-Lay and Nabisco/Interbake transactions are, incidentally, part of the global phenomenon of mergers in the food industry. Similar examples can be found in a number of European countries and the U.S.

3. Another recent case involved the acquisition by Baxter Foods Limited, a dairy in the province of New Brunswick, of another dairy in that province. This transaction was abandoned as a consequence of our announced intention to challenge the proposal before the Tribunal. The end result was pro-competitive since the dairy in question was subsequently sold to another smaller dairy in New Brunswick.

4. Asea Brown Boveri (ABB) Inc.'s proposed acquisition of various assets of Westinghouse Canada Inc. was a merger that involved a settlement subsequent to the public announcement earlier this year of my intention to challenge the transaction before the Tribunal. That merger and the merger of the computer reservation systems of Air Canada and Canadian Airlines International (the Gemini case), which was

initially contested through extensive litigation, were settled on the basis of precedential consent orders.

We used the consent order remedy with respect to the ABB/Westinghouse transaction to obtain what we consider to be a balanced settlement in relation to the market for electric power transmission and distribution facilities. This was a particularly complex situation in which simplistic approaches would not have worked. We needed, in this case, a resolution that took into account a variety of domestic and foreign competition considerations. The resolution reflects the kind of interaction we can expect to see more of between trade policy and competition policy.

We were able to achieve such a balance because the Act allowed us to consider real world economic factors. They included the impact that both the Canada-U.S. Free Trade Agreement and ABB's commitment to seek a combination of tariff remission and accelerated tariff reduction would have in reducing barriers to entry and facilitating increased foreign competition. At the same time, the resolution encourages innovative activity in Canada and fosters the attainment of efficiencies that will allow ABB to better compete in foreign markets.

5. Another milestone was the Gemini case. In that case, contested litigation had already proceeded for about a year before the proposed consent order was agreed to and

submitted to the Tribunal. I characterize the case as a milestone because the Tribunal, in granting the consent order, clarified its role with respect to the issuance of such orders.

The Tribunal said that its role is not to ask whether the terms of a consent order represent the optimum solution to a given problem, but is rather to determine whether the consent order meets a minimum test of ensuring that there will be no likelihood of a substantial prevention or lessening of competition. The Tribunal also indicated its willingness to consider behavioural type orders in certain circumstances.

6. There have also been a number of cases in which efficiency gains have played a role. These include the acquisition by Fletcher Challenge Limited of British Columbia Forest Products Limited; the acquisition of Fruehauf Canada Inc. by the Trailmobile Group of Companies Ltd; the acquisition by Dofasco Inc. of the Algoma Steel Corporation; and the recent acquisition by Consumers Packaging of Domglas where anticipated efficiency gains were confirmed by an independent expert to be in the order of \$53.9 million (Canadian) a year. Those gains should permit the parties to better meet foreign competition both in Canada and in the U.S.A.

Concluding Remarks

To sum up, the topic of mergers and joint ventures provides many worthwhile opportunities for the discussion of interesting and common issues. The Competition Act of 1986 is the product of many years of careful assessment and planning. As well, we have learned a great deal during the first three years of administering the Act. I know that some of our counterparts in the antitrust agencies of other OECD countries are examining the Competition Act as part of the process of updating their own legislation. Developing countries, while taking into account their own particular circumstances and requirements, are similarly welcome to examine the Canadian experience.





# Speech



Consumer and  
Corporate Affairs Canada

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et Corporations Canada

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## COMPLIANCE INTO THE 1990'S

NOTES FOR AN ADDRESS

TO THE

INSIGHT EDUCATIONAL SERVICES CONFERENCE

BY

HOWARD I. WETSTON

DIRECTOR OF INVESTIGATION AND RESEARCH

BUREAU OF COMPETITION POLICY

TORONTO, DECEMBER 4, 1989





I am pleased to have the opportunity to speak today about the Program of Compliance of the Bureau of Competition Policy. Both the Bureau and the private sector have faced a challenging period since the Competition Act was passed in 1986. The compliance initiative was designed to provide business with greater awareness and increased certainty about the application of the provisions of the Act. I believe we've had a significant degree of success in meeting these aims. Through the 1990's we intend to continue to enhance the administration and enforcement of the Act in Canada, and I'd like to spend my time here today talking about how we will be approaching that job, and where I see some of the priorities for the next few years.

First, a little background may be helpful. In your material there is an Information Bulletin (no. 3) titled "Program of Compliance". The Bulletin outlines a number of ways in which we have attempted to provide interpretive information and guidance to those interested in the objectives and application of the Act. These measures include published material such as Information Bulletins, speeches, annual reports, press releases and backgrounders on specific cases. The Bureau also provides advisory opinions and makes use of information visits--by that I mean direct discussions with business people--to ensure that they

are made aware of potential conflicts with the Act. Advance Ruling Certificates are provided in merger cases which do not raise competition issues. All of these initiatives are intended to assist business in organizing its affairs to comply with the law. The Consultative Forum, on the other hand, allows groups of academics, consumers, business people and lawyers to provide feedback on issues relating to competition law and policy.

When conflicts with the Competition Act do arise, there are various alternatives available to resolve the problems. These include investigative visits, voluntary undertakings, prohibition orders on consent, orders on consent involving a plea of guilty, merger consent orders and of course litigation before the courts or the Competition Tribunal. The Bulletin describes some of the more important considerations that are taken into account in deciding which of these approaches is appropriate.

While the practical aspects of the Bureau's Compliance Program are listed in the Bulletin, I would like to spend some time focussing on the underlying philosophy of the expanded program that I intend to implement and discuss my views on how the Bureau will work with business toward the goal of compliance in the future.

First, it is worth emphasizing that inasmuch as the Competition Act is a framework law governing certain aspects of the conduct of business, the compliance approach works



only by building upon co-operation among the various interested parties to a matter.

Obviously, it is cost-efficient to devote resources to educating the public and preventing contraventions of the Act, as opposed to conducting extensive inquiries and prosecutions. As I've just outlined, the Bureau has put great emphasis and considerable resources into providing information and guidance and devising a variety of instruments to resolve cases under the Act, but what is the responsibility of the business sector?

For the most part, business now has the tools to review, assess, understand and therefore comply with the law. Where businesspersons know that their proposal presents a problem in terms of the Act, we are receptive to discussing proposed solutions. If they make sense, are workable and do not contravene the objectives and standards of the Act, then a mutually acceptable solution is possible. However, I believe that the responsibility for preparing these solutions must rest with business, not with the Bureau.

For example, assume that the Director has determined that a particular merger is anticompetitive, i.e., is likely to prevent or lessen competition substantially. Parties should, if they wish to resolve the matter, approach the Bureau with a well-thought out workable solution. Unfortunately, companies often spend considerable time

trying to "undo" the Bureau's finding or continuing to advocate a proposed solution that has not been well received by the Bureau. It may be worth repeating that settlements with the Director are matters of public policy, not private contract.

The Bureau has a heavy case load. At this time, in mergers alone, we have thirty-eight extensive ongoing examinations. While negotiations are necessary, continuing unfruitful or slowly moving discussions is not an efficient use of the Bureau's resources and exacerbates the environment of uncertainty for various third parties.

An evaluation of the circumstances which might influence the decision about full inquiry and formal proceedings should include careful consideration of the purpose clause of the Competition Act. The purpose clause is key to the compliance approach. It highlights the paramount objectives of the Act such as promoting the efficiency and adaptability of the Canadian economy and providing consumers with competitive prices and product choices. Business practices must be reviewed in this light.

Where there is unambiguous economic harm, there will be less scope for resolution through the compliance approach. Full inquiry is clearly justified in matters such as conspiracies in restraint of competition and bid rigging, which are serious matters that are not accompanied by any redeeming features. The heart of any competition policy

must include the goal of preventing competitors from subverting the competition process through collusion. This is reflected in the maximum penalty established by Parliament--10 million dollars or five years in prison.

Conspiracy in restraint of trade can impose heavy costs on consumers in the form of higher prices, reduced output and restricted product choices. Generally speaking, this is not the kind of conduct where prohibition orders or undertakings adequately protect the public interest. The rigging of bids in connection with federal, provincial or local government procurement activities directly increases costs that are ultimately borne by taxpayers. Recent studies suggest that government agencies and regulated utilities may be particularly vulnerable to bid-rigging activities. In addition, conspiracies among firms that would otherwise be in competition seriously undermines public confidence in the competitive market system. We therefore intend to recommend stiff penalties when such matters are referred to the Attorney General for prosecution.

With respect to other matters, such as the non-criminal provisions, we will be most receptive to employing an approach which avoids costly litigation to deal with situations that have ambiguous, minimal, transitory or very local economic effects. Such situations are presented from time to time in relation to matters such as non-price

vertical restraints, with respect to which there is currently a raging debate regarding their economic effects. As suggested above, our "economic approach" will focus upon the goals of section 1.1, such as promoting the efficiency and adaptability of the Canadian economy and ensuring competitive prices and product choices. Accordingly, where significant economic harm in these or other respects is clear, and in matters of broad public interest, a full inquiry and litigation may best serve the public interest.

There are some very recent visible examples of this--we have recently filed cases before the Competition Tribunal against Xerox Canada Ltd. respecting its refusal to deal with an independent repair firm, and against the NutraSweet Company for alleged abuse of dominant position. The Tribunal has recently issued an order against Chrysler Canada Ltd. regarding the supply of auto parts to a small exporter.

Compliance involves individuals as well as corporate conduct. The question arises as to whether or not individuals should be charged in order to curb perceived corporate excesses. While this is ultimately in the discretion of the Attorney General, I believe that where the evidence is sufficient--particularly for planned and premeditated conduct--appropriate criminal proceedings should be instituted against individual offenders. There is

an obvious, very important, deterrent effect from such proceedings.

Increased compliance with the Act benefits everyone in the end. For our part, I recognize that the more we help inform the public, the more effective the Compliance Program will become. The Bureau will continue to develop methods to clarify questions of competition law and to better communicate them to interested parties. One area I have been giving considerable thought to, since assuming my new responsibilities, is the merger review process. I am now exploring the preparation of published merger guidelines as a framework for our merger enforcement policy. I believe that in the current environment, merger guidelines may be particularly helpful in order to increase business understanding, assist counsel in advising clients, clarify our enforcement policy and finally facilitate compliance with the law.

With the busy merger environment and the absence of jurisprudence, there appears to be an increasing need for a comprehensive statement setting out how we approach pivotal issues such as market definition, foreign competition, failing firms, barriers to entry, efficiency gains, and so forth. To provide a framework for our position in relation to these and other matters, we also want to develop a general policy statement regarding our approach to the



anti-competitive threshold in section 92, that is, the prevention or lessening of competition substantially.

Until the Tribunal addresses these and other key issues relating to mergers and to merger analysis generally, guidelines can go a long way toward reducing uncertainty with respect to the interpretation of Canada's new merger law. After analysing in varying detail more than 500 mergers since June 1986, I believe we are now in a position to undertake such an initiative.

Our current thinking is that, to the extent possible, these guidelines should provide legal merger counsellors and businesspersons with clear and objectively ascertainable standards in the planning stages of developing transactions. Guidelines however are just that. They should not be rigid or inflexible in applications where strict adherence to the articulated standards would lead to inappropriate results. Competition policy is not a static concept. One must deal with constant change. As such, merger guidelines must reflect current enforcement policy but must maintain flexibility of approach.

Information Bulletins are a key element of our Compliance Program. With respect to criminal matters, we are now reviewing our enforcement policy regarding price discrimination and predatory pricing. We expect to issue draft Information Bulletins for discussion in the near future.

This morning you heard a presentation on the concept of corporate compliance programs. I think the development of corporate codes of conduct or corporate ethical standards can be of significant value. In the normal course of doing business, they will enhance the individual manager's consciousness of the law and its underlying spirit. Corporate programs, combined with government initiatives such as the Bureau's compliance approach, make sense for the 1990's--an era when we all must deal with decreasing resources, technological change, demands for consumer protection, deregulation, and a changing legal environment. I believe that corporate codes are important as they set the tone from the "top" of an organization. If the marketplace of the 90's is to be effective, we must consider some rebalancing of the obligations of business, consumers and governments; the Bureau will certainly be active in this process.

I think we have a good example of a recent success story concerning the use of the compliance-oriented approach that should be mentioned. You might remember an inquiry commenced in 1987, respecting the real estate industry in Canada, and that a number of real estate boards were searched under the provisions of the Competition Act for evidence concerning an alleged price conspiracy. As the inquiry developed, the opportunity arose for the Director and the Attorney General of Canada to consult with the

umbrella group for the industry, the Canadian Real Estate Association or CREA. By consulting with CREA, which represents a large proportion of real estate associations, compliance with competition law was possible beyond the market areas initially under investigation. After considerable discussion, a decision was taken to proceed by way of a prohibition order without a plea of guilty. This order results in compliance with the Act, allows the best allocation of scarce resources, and institutes an important change in market behaviour across Canada.

I am encouraged that CREA has made a significant attempt to make sure that their industry really understands the application of competition law. The Association has prepared an excellent videotape for use in the education of their members all across Canada.

The Bureau has done a considerable amount of work on its Compliance Program since the new Act was passed in 1986. In this regard, I hope I have succeeded in providing some additional clarification on the Program, on the philosophy and some of the priorities which will drive the Bureau in interpreting and enforcing the Competition Act in the 1990's.

# Speech



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THE EVOLVING ROLE OF  
COMPETITION POLICY IN THE 1990'S

NOTES FOR AN ADDRESS

TO THE

CANADIAN CLUB

BY

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DIRECTOR OF INVESTIGATION AND RESEARCH

BUREAU OF COMPETITION POLICY

MONTREAL, FEBRUARY 12, 1990







I want to begin with a quote attributed to that legendary philosopher of home plate: Yogi Berra. Who said this: "If you don't know where you're going, you could wind up somewhere else."

Looking ahead at where you're going is a useful discipline at any time and it's a particularly appropriate one in the first year of a new decade. And my speech today basically is a look at where we're going in Canadian competition law -- at some of the challenges we expect to have to deal with in the 90s, and how we intend to respond.

And for those of you who are neither lawyers, nor economists nor bureaucrats, a word of reassurance. This is not a limited-interest topic. Competition law and policy, to use a well-worn cliché that nevertheless has a kernel of truth--is everyone's business. It affects every one of us every day of the week. It figures in the day of the consumer out shopping for the best buy on laundry detergent or automobiles. It's on the agenda of the boards of directors of businesses fighting to stay competitive. It's the concern of employees of these businesses who want to stay employed.

Furthermore, the issues we confront in this field are directly related to the most basic economic challenge Canada faces in the 1990s, which is the need to match or surpass

foreign competition on world markets. Or, to put it another way, Canada's need to grow in economic efficiency--in the ratio of output to input.

Competition law is an element--not the only one to be sure--but an important one--of the government's strategy for responding to this challenge. The Act itself was written in the '80s, with an eye on the '90s and beyond. Its opening clause, the one that defines its purpose, talks specifically about promoting efficiency and expanding opportunities in foreign markets. And the goals of the Bureau of Competition Policy, which administers that law, are directly linked to these national targets.

These targets are not stationary but are moving ones. Thanks to new technology, falling tariff barriers and other changes, the economic environment is in constant flux. And this means that no policy prescription, no list of priorities valid at a certain date, can ever be final. Fortunately in this respect too, the drafters of the Act were looking ahead, and the legislation we have gives us the flexibility we need.

That brings me to the Bureau of Competition Policy and how we see some of the challenges immediately ahead.

Today I want to mention some priority areas which require attention:

- . Developing a better approach to price discrimination, predatory pricing and merger review

- . The Merger Consent Order Process--that is, the means of resolving an anti-competitive merger before the Competition Tribunal without full litigation, and,
- . Increased attention to the state of competition in Canada's regulated industries.

Let me start from the top with the issue of Price Discrimination.

The need here, basically, is to clear up uncertainty. Let me explain.

The Act makes it an offence for a supplier to knowingly discriminate between competing purchasers. Without getting into the legal detail, the basic idea is that suppliers should not follow a practice of knowingly discriminating between competing purchasers of articles, when those purchasers are buying the same quantity and quality. It sounds relatively straightforward. Yet the Bureau receives more requests for interpretation on this section of the Act than on any other. One reason for the confusion is that, although the Act itself is new, this section dates back to the 1930s, and in language and economic orientation it bears the imprint of a bygone era. A more important reason, I believe, is interpretation. We've come to realize that in some cases price discrimination can contribute positively to competition, so that to interpret the section literally might run counter to the purpose of our Act.

Whatever the cause, it is fairly obvious that uncertainty exists, that it is inhibiting businesses in their plans, and that we need to clear away the fog.

The same problem applies to another important provision affecting marketing--that is predatory pricing. Predatory pricing, in simple terms, means a price war waged without the Geneva convention--price-cutting as a strategy of annihilation, to eliminate a competitor.

As any business person knows, it is not all that easy to distinguish between the predatory price and the genuinely good competitive deal--the kind that all consumers, are constantly searching for. And that brings us to the nub of the issue. Genuine predatory pricing is a rare occurrence. The law on predatory pricing should not have a chilling effect on competition, but fear of prosecution might cause that effect.

So we have problems with these two provisions. How do we fix them? It may be that some practices currently considered under these criminal provisions of the law, fit more logically into the non-criminal sections--for instance in the provisions on "tied selling" or "abuse of dominant position." We want the view of the legal and business communities on this matter, and to enlist them we are preparing two discussion papers which will be circulated this spring. I hope anyone in this audience who is interested in competition law will take this as an invita-

tion from the Bureau to join us in this process. My intention is to issue two bulletins which I hope will provide business with the necessary parameters to establish competitive pricing policies that are not in potential contravention of the Competition Act.

Our next priority concerns merger review and merger guidelines.

Mikhail Gorbachev may have been TIME's man of the decade. But in competition law, the '80s was the decade of the merger--the largest wave of acquisitions, takeovers and buy-outs, leveraged and otherwise, in history. The Act was launched on the crest of the wave. Since the Competition Act came into force in June 1986, the Bureau has recorded over 3,700 mergers.

As a result we have accumulated a very large fund of experience in the application of the new merger provisions, in a very short time. And in law, there is no substitute for experience. Each merger review has taught us something new or clarified some issue. Definitions and interpretations have become sharper.

On the theory that this experience is a resource which needs to be shared, we are giving a high priority to production of a published document on merger guidelines for the use of business people and merger counsellors. This will allow plans to germinate and take shape in the light of a clearer understanding of our approach to matters such as



market definition, foreign competition, barriers to entry, the application of the Act to failing firms and, of course, to the key issue of tradeoffs between efficiency gains and reduced competition.

The guidelines themselves will have to be carefully crafted. To be useful they must be reasonably specific and precise. At the same time they must be flexible enough to allow for differences in individual situations; a simple formula approach is not possible given that competition is a dynamic process and our need for forward looking analysis. In this project too, we will be counting on assistance from the business and legal communities, and other interested parties such as academics and consumer groups.

And, let me add, there will still be plenty of use for merger guidelines. You may have read--I know I have--that the merger wave has peaked. Certainly what we see at the Bureau is a continuing flood. We have had more mergers in the past ten months than in the whole previous year. At this moment we have about thirty active merger files under review. I am including Imperial Oil/Texaco in this list. There is yet much to do.

I know that the Imperial Oil/Texaco consent order proceeding has been the subject of a good deal of press coverage and discussion. And this is to be expected--the merger is very large and complex, not just in dollar value

but also in its impact on business, consumers and observers of the process of merger enforcement in Canada.

The merger review process, ideally, needs to be both certain and timely. But we have to consider that the Bureau, and the Competition Tribunal, need to balance interests which may be somewhat different. For example, there may be differences between the extent to which the public is informed, and the merging companies' desire to maintain confidentiality in the market. There is a clear need to balance speed with a thorough review and full participation by affected parties. There aren't any perfect answers to these types of questions. I know that we have learned from this case, and that we now have a better appreciation of some of the challenges that have to be met in the future.

I recognize that the consent order process has received considerable attention, and there is little doubt that we will examine ways to streamline the process. At the same time, I am confident the order will protect the interests of consumers and provide them with competitive prices and product choices at the gas pump. The Bureau is committed to finding a way to make the process work better and faster while still protecting the interests of Canadian consumers.

In the 1990s, we intend to get more involved with the issue of competition in the regulated sectors of the Canadian economy. In my view, there is an opportunity for an

increased role for market forces in regulated industries. This has come about as policymakers generally have recognized the cost of regulation to the public, and have begun to adopt market-oriented solutions rather than adherence to traditional regulatory approaches. Also, the rapid and fundamental technological changes that are being experienced world-wide have undermined the basic premises for traditional regulation. Regulators are facing fundamental questions on how best to respond to these trends. It is our view that wherever possible, there should be greater reliance on market forces. As Thomas Edison once said--there is nothing more powerful than an idea whose time has come.

A current example which illustrates these trends is the present hearing before the CRTC on the regulation of cable television. Technology in this industry is evolving to the extent that the cable industry will soon be faced with alternative technology for the distribution of programming. Last Monday I appeared before a hearing of the CRTC on the subject of cable TV subscriber fees. In our view, an approach is necessary that would serve the wider goals of the Competition Act--either in terms of protecting subscribers from high prices, or of giving cable companies a reason to become more efficient.

What would be the best approach? In one word: competition. I suggested that the CRTC consider the application of

various technologies to bring in local competition. The effect, we argued, would likely be better prices and more choice for consumers--and a wider range of delivery methods for the networks. Until then, I submitted that more effective regulation of fees was required to control profits and prices.

Obviously there is no guarantee that the Commission will go along with our suggestions--the CRTC has to balance a number of national interests. The point is that a healthy competitive process is one of those interests.

I want to mention now, another aspect of the changing economic environment which will exert a steadily increasing influence in the 1990s. I mean the Canada-US Free Trade Agreement.

As the tariff walls come down year by year, the need for Canadian and American business to coordinate anti-trust and competition-related arrangements will grow. Fortunately we are not starting from scratch. Although there are some significant differences in our approaches to competition law, on matters of basic economic principle, we are coming from the same place. We are both committed, for instance, to balancing economic efficiency with protection of the competitive process. Because of this basic commonality of purpose, our relationship in the area of anti-trust law has been remarkably harmonious in recent times and has been

characterized by contacts and cooperation at many levels between the Canadian and U.S. anti-trust agencies involved.

What we have not had up to now and what we need as Free Trade takes hold, is to strengthen those links so that while maintaining our distinctive domestic approaches, we can work together to protect competition on a North American scale.

We recently held the first of what will become regular meetings with the Chairman of the Federal Trade Commission and the head of the Anti-Trust division of the U.S. Department of Justice, and we have already set up working groups to tackle problems of common concern. As proof of their commitment, the Americans pointed out that although the meeting was held in the depths of an Ottawa winter they had enthusiastically accepted a Canadian venue. We have already taken the opportunity to demonstrate Canadian zeal by agreeing to meet in Washington in the height of summer.

So much for the external changes. A word now about a relatively new matter in Canadian competition law itself. The Act of 1986 introduced the concept of Abuse of Dominant Position--and this signalled a shift in emphasis from market size to market behaviour. In colloquial terms, the Act says don't concentrate on bigness alone. The task is to distinguish between advantage which derives from superior competitive performance and that which derives from anti-competitive behaviour.



The first case under these provisions is now before the Tribunal, involving NutraSweet. Naturally I will not comment on these proceedings, but I can describe our position as presented. We allege, basically, that NutraSweet followed specific policies designed to prevent the entry of certain competitors into the Canadian market-place. As a result, we say that competing producers have not been able to get their foot into the door of major users of artificial sweeteners.

As the first case under the new law, this hearing will serve as an important test of these new provisions.

Another priority for the Bureau in the '90s will be maintenance of a high level of efficiency in our own organization. We don't see this as a purely internal housekeeping issue but part of the wider goal. The quality of administration in this field impacts directly on Canadian competitiveness. It can quicken business responses or slow them down. It can add to certainty or it can create confusion. We intend to make sure, through regular review and adjustment, that our procedures help, not hinder, Canadian competitiveness.

Two final points on matters of general principles which will guide us in the administration and enforcement of the Act.

First: although we are committed to the goal of achieving voluntary compliance we realize, in common with

the Rolling Stones that you cannot always get what you want. Sometimes it will not be possible, sometimes it will not be desirable, to avoid the courtroom. You can expect to see less use of prohibition orders and more prosecutions. We will take a vigorous line on criminal activity such as price-fixing and bid-rigging--and we will be fully prepared to bring charges against individuals. This may be the only way to deter illegal economic excesses.

Second: our objective is not to grind out inquiries but to build a path lit by clear understanding and precedents. So we will be selective in our choice of cases. If we have the choice between one significant case which throws light on important economic and legal questions, and several matters of limited interest, the significant case will go to the head of the line. I think it is fair to say that our Act now has a clear economic focus.

To sum up ladies and gentlemen, the task of protecting competition and consumer rights will present new challenges in the 1990s. We will adapt to these challenges best if we do so together--business, government and consumers working in partnership. We have every reason to understand the importance of an adequate response. The purpose of this work, after all, is to protect a vital force whose value has never been more apparent than today--when so many societies throughout the world who let the flame die, are trying desperately to re-ignite it in their own economies. For

business, government, consumers and Canadians in general, this is a common agenda item for the nineties and a cause common to us all.

Finally I would like to add that I'm very happy to be here today and that I wish to be in Quebec more often. There are many important issues of Competition policy for the Bureau to deal with in this province. I hope that my speech has been informative for you, which of course is one of the objectives for the Bureau's program of compliance.

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# Speech



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## MERGER LAW IN CANADA:

### AN UPDATE

Notes for an Address

By

Howard I. Wetston

Director of Investigation and Research

Competition Act

Consumer and Corporate Affairs Canada

to the

17th Annual Conference of the Fordham

Corporate Law Institute

New York, October 19, 1990







I am pleased to have this opportunity to update you on the current status of Canadian merger law and the initiatives we are pursuing in this area. In particular, I want to spend some time discussing several recent court decisions and the first Merger Enforcement Guidelines, which we expect to circulate for consultation in the near future.

As those of you familiar with Canadian competition legislation are aware, enactment of the *Competition Act* in 1986 dramatically improved Canada's ability to address anticompetitive mergers. Since 1986, mergers have been examined in Canada under non-criminal standards, taking full advantage of what is often termed the "new learning" in the area of industrial organization. Principal among the economic concepts adopted is that the Act protects competition, not individual competitors, and the view that a market's performance cannot be predicted only from its structure or high levels of industry concentration. The purpose of the *Competition Act*, as stated in section 1.1, is in part to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy; competition is not a desired end in itself.

The implementation of the *Competition Act* could not have occurred at a more opportune time. Merger and acquisition activity in Canada has continued to grow despite difficult economic times. The supply of capital to finance acquisitions appears to have become increasingly available and sophisticated. The pressure on business to rationalize operations in response to enhanced North American and global competition is expected to continue. The need for rationalization is thought to be stronger for Canadian firms because our markets are frequently small relative to the efficient scale of most production. In the past, this has imposed cost disadvantages on Canadian firms competing at home and in international markets. To combat this, firms have combined in an attempt to realize longer production runs and other more cost-efficient processes. The importance of rationalization tends to vary by industry; we may expect to see more extensive merger activity related to rationalization in mature, commodity-based industries.

For the Competition Bureau, recent years have been exceedingly busy. Not only did we assess more transactions than in previous years, but those examined were highly complex. Since the *Competition Act* came into force in 1986, approximately 4000 mergers and acquisitions have taken place in Canada. In 1989, merger and acquisition activity in Canada had a total value of \$30 billion, representing a 26 percent increase over 1988, and exceeding the previous record level of \$28 billion set in 1987. About 15 percent of these transactions posed a competition issue of sufficient magnitude to warrant an examination by the Bureau of two or more days.

The vast majority of mergers that typically present no competition issue include: vertical and conglomerate mergers; financial transactions where there is no significant change in control; mergers which bring a new player into a domestic market (this is particularly true for many foreign investments in

Canada) or a new investor from another part of Canada into a regional market.

It is interesting to note that despite high Canadian interest rates and the slowdown in North American economic activity, the number of mergers now under examination by the Bureau is at its highest level since the inception of the merger review process under the new Act. A number of factors may help explain this trend:

- (1) Offshore capital is moving into Canada in order to establish a North American presence. Merieux's purchase of Connaught Laboratories is a recent example of such a move.
- (2) There is a tendency for some Canadian companies, after reaching a certain scale, to seek a larger buyer--either domestic or foreign--to provide the capital, management, marketing, distribution channels, and research and development capability to support future growth. Typical examples include Canadian resource companies involved in oil and gas exploration and development.
- (3) Some Canadian industries are restructuring in response to the Canada-U.S. Free Trade Agreement, although the number claiming CUSTA as the stimulus to their transaction is considerably less in our experience than has been anticipated. However, a number of mergers in the printing industry, where tariffs are being reduced to zero from 28 percent, support this proposition. Other examples include Trailmobile's purchase of Fruehauf and the acquisition of Domglas by Consumers Packaging.
- (4) In other cases, companies are selling off their more peripheral activities in order to streamline their operations and return to their traditional core businesses. Both the Canadian Pacific and Bell Canada Enterprises conglomerates have been trimming businesses in recent years. CP has divested itself of a lot of its trucking businesses in addition to the airline. Likewise, BCE has sold off their interests in real estate development.

Examples of files now under review by the Bureau include the proposed joint venture between Canada's second- and third-largest flour-milling companies, Maple Leaf Mills and Ogilvie Mills; the acquisitions by Canada's largest daily newspaper chain, Southam Newspaper Group, of a number of community newspapers in British Columbia; Aults Foods' acquisition of the ice cream division of William Neilson Ltd.; and several dairy acquisitions in the province of Quebec.

The shift from a goods-based to a service- and knowledge-based economy is also leading to heightened Canadian merger activity in the financial, legal and accounting sectors. These developments will pose new and challenging issues for anti-trust authorities throughout the industrialized world.

Some have argued that with the advent of freer international trade, anti-trust policy is becoming less important and necessary in countries like Canada. I do not agree. Effective and pragmatic enforcement of anti-trust law is a complement to, not a substitute for, trade liberalization. Anti-trust enforcement



that is responsive to global trends and the realities of the modern industrial economy is necessary to ensure that the economic gains and opportunities afforded by freer international trade are maintained and provide important economic benefits to consumers as well as to industry.

In Canada, new laws are often subject to constitutional challenges, and the *Competition Act* of 1986 has been no exception. Anyone familiar with Canadian competition policy could well have predicted constitutional challenges--they have occurred with every piece of competition legislation enacted in the country. The *Charter of Rights and Freedoms* has provided the basis for a number of significant challenges against fundamental areas of competition law and enforcement. In the *Couture* case, in a decision of the Quebec Superior Court, Judge Phillipon struck down the Competition Tribunal in its entirety. This decision is under appeal. The appeal focuses on the independence and impartiality of its lay members, and on the Tribunal's powers with respect to mergers. The arguments made in *Couture* have since been adopted in other non-merger proceedings before the Tribunal by the respondents in the *NutraSweet* and *Xerox* cases.

The Tribunal has since ruled on these matters in the *NutraSweet* case--our first case under the abuse of dominant position provisions of the Act. In addition to affirming its constitutionality, the Tribunal issued a decision which clarifies much within the law. It concluded that the NutraSweet Company's use of exclusive dealing, certain financial incentives or fidelity rebates and its exclusivity clauses has lessened, and are likely to lessen, competition substantially. A remedial order prohibiting such practices has been made.

The Competition Tribunal's judgment on the merits of the *NutraSweet* case is significant for a number of reasons. First, the Tribunal clearly took an economic approach to the adjudication of the case. It devoted special attention to matters such as the relevant product and geographic markets, entry barriers and market foreclosure through patents. Second, the Tribunal recognized that the illustrative list of anticompetitive acts referred to in the abuse provisions is clearly not intended to be exhaustive. Thus, the sections appear to be applicable to virtually any act employed by a firm for the purpose of excluding or disciplining its competitors. Third, the Tribunal clarified the approach to be taken in applying the test of lessening competition substantially, which is a key element of the abuse section and other sections of the Act. It indicated that the issue to be addressed in applying this test is whether the alleged anticompetitive acts preserve or add to the firm's market power.

In the case of the constitutional arguments, the Tribunal's finding is similarly clear and concise, concluding that the Tribunal panel hearing the *NutraSweet* case has been validly constituted. In its decision, the Tribunal found that a reasonable, informed person would see in the various arrangements made for membership of the Tribunal adequate protection against bias on the part of a given lay member. The validity of the

Competition Tribunal was also upheld, based on the fact that there is not only judicial review of the Tribunal provided by the legislation, but also full powers of appeal from its decisions to the Federal Court of Appeal. As a result of the decision, the Tribunal remains available to hear applications by the Director, and we fully intend to make such applications as further cases arise.

Another significant constitutional challenge to the Act relates to the conspiracy provisions, the central pillar of any competition legislation. Early in September of this year, the Trial Division of the Nova Scotia Supreme Court ruled in a case involving the Pharmaceutical Association of Nova Scotia that the conspiracy section of the Act is incompatible with various provisions of the *Charter of Rights and Freedoms*. The Court held that the legislation is in conflict with the Charter because it allows for the conviction and imprisonment of a person without a sufficient finding of criminal intent, in that there is no obligation on the Crown to prove that an accused intended to lessen competition unduly. Further, the court held that the Act does not provide adequate information as to what business conduct is illegal because it incorporates the standard of an "undue" lessening of competition. This standard was found to be too vague, and therefore the legislation violated the Charter provisions that guarantee the right to fundamental justice, the right to make a full answer and defence, and the right to a fair trial.

Obviously, these are important questions of law that need to be resolved expeditiously. However, in spite of these challenges, the Bureau continues to vigorously enforce competition law in Canada. While these decisions have created some uncertainty, the Director continues to promote voluntary compliance with the Act and, where necessary, take enforcement action.

A second area that merits specific mention and has received considerable attention is the merger consent order process. Practical experience before the Tribunal, particularly in the aftermath of the Imperial Oil/Texaco proceeding, has raised some concerns regarding the present use of consent order proceedings in Canada. While it is clear that the merger review process must be both certain and timely for the merging parties, it must also be enforced in a manner that balances the interests of the parties with those of the public affected by the merger. With this standard in mind we have spent considerable time reviewing the Imperial Oil and other consent order proceedings, and have concluded that the use of consent orders is still warranted in certain situations. We have also determined ways to expedite the process before the Tribunal.

The Bureau is also taking additional steps to clarify our merger enforcement procedures under the *Competition Act* by issuing Merger Enforcement Guidelines. The need for such clarification stems from the fact that the legislation enacted in 1986 created a new legal and economic framework for merger review in Canada. As a result, there is little in the way of



jurisprudence to assist the Bureau, business or merger counsellors on merger policy.

Given the nature of Canadian merger policy, we expect that contested mergers will continue to be few in number. Where competition problems surface, it is most likely that resolution will be by way of undertakings to the Bureau of Competition Policy or possibly by consent orders before the Tribunal.

In the context of this legal and economic environment, one of the Director's top priorities has been to develop Merger Enforcement Guidelines for release to the public in the near future. The Guidelines should carefully advise the public of the Bureau's policies, be consistent with current legal and economic thinking, and reflect Parliament's clear intention that there be a meaningful role for merger policy.

There are several principal objectives in establishing Guidelines. First, the Guidelines should promote a high level of public confidence in the Bureau's merger review process. In this regard the Guidelines are not a restatement of the law. Rather, they provide a description of the Bureau's enforcement policy in sufficient detail to guide to the maximum extent possible without compromising flexibility and discretion.

Second, the Guidelines will promote a better understanding of the Bureau's merger review process, and so will reduce any uncertainty or unpredictability that is associated with, or is perceived to be associated with, Bureau merger review. The new *Competition Act* has created a fundamental change in its emphasis on economic analysis by highlighting matters such as barriers to entry, efficiencies and foreign competition. In order to assist business persons and counsellors to work within the new framework, the Guidelines will provide considerable detail, clear bright lines and guiding principles when appropriate. However, judgment will continue to play an important role in enforcement policy without "pretending unattainable scientific rigour."

Third, the Guidelines will, we hope, facilitate and influence business planning and practices. This last goal is important; the *Competition Act* should only come into play when a transaction prevents or lessens competition substantially. It should not have a chilling effect on transactions that would have benign consequences for competition.

The Merger Guidelines will not increase merger challenges by the Bureau of Competition Policy or increase the requirements for negotiated settlements. They will, however, enhance our compliance program considerably.

We anticipate that a further important benefit of issuing Merger Enforcement Guidelines will be to improve the quality and predictability of information provided to the Bureau for our assessment of particular transactions.

At the present time, we are in the process of completing a draft of the Guidelines that will be circulated to the public on a widespread basis for comment later in the year. In arriving at the positions articulated in this document, we have benefitted considerably from preliminary consultations with a small group of outside economic and legal experts, both in and outside Canada.

I should make it clear that the following comments on Merger Enforcement Guidelines reflect a draft which is still being developed, and that certain changes may be made following the consultation process.

The Bureau's Merger Guidelines will begin with a section that articulates what we consider to be the legal definition of the term "merger," which is contemplated in section 91 of the Act. In this regard, the key issue to be discussed is the Bureau's approach to the term "significant interest." Our position has been that the acquisition or establishment of a significant interest in the whole or part of a business of another person occurs when a person acquires or establishes an ability to materially influence the economic behaviour of a second person.

Part II of the Guidelines will articulate the general circumstances in which the Bureau considers that a merger may "prevent or lessen competition substantially," as that notion is contemplated by section 92 of the Act. In short, as with the U.S. Department of Justice and other enforcement authorities around the world--the Australian Trade Practices Commission, for instance--the Bureau will adopt a market power approach that focuses primarily on whether prices are likely to be higher than they would be in the absence of the merger or a part of the merger. The Bureau will also examine any potential for anticompetitive effects relating to various non-price dimensions of the transaction, such as a reduction in service, quality, variety, advertising or innovation, where rivalry in terms of these dimensions of competition is important.

Part III of the Guidelines will provide a comprehensive presentation of the Bureau's approach to market definition. This approach is based on the now well-known hypothetical monopolist framework that was first described in the U.S. Department of Justice's 1982 and 1984 *Merger Guidelines*, and has recently been endorsed in the Australian Trade Practices Commission's bulletin, *Misuse of Market Power*. Our analysis suggests that this framework will yield a more accurate and rigorous anti-trust market for merger analysis under the *Competition Act* than alternative approaches. An additional benefit for parties to mergers spanning the Canada-U.S. border is that markets will be defined in a consistent manner by enforcement agencies in the two countries. This benefit will become increasingly significant as progressive tariff reductions under the Canada-U.S. Free Trade Agreement result in greater integration of markets spanning both nations.

After articulating the conceptual framework of the hypothetical monopolist approach to market definition, the Guidelines will deal with the various criteria that the Bureau assesses in applying the approach in practice. These include price relationships, ease of product substitution, views of buyers and others in the industry, end use, physical characteristics, switching costs, transportation costs, local set-up costs and shipment patterns.

The section on market definition will be followed by a detailed discussion of the Bureau's approach to each of the evaluation criteria that are mentioned in section 93 of the *Competition Act*, together with a statement of our approach to market share/concentration and to various additional criteria that staff typically address in the context of the subsection 93(h), "any other relevant factor" stage of the assessment process. In this latter regard, the general criteria discussed may include countervailing power, the level of market transparency, and the frequency and value of transactions in the market. In addition, the Guidelines will outline the limited circumstances in which enforcement action may be warranted in respect of a vertical merger, and one circumstance in which concerns could be raised by a conglomerate merger.

Insofar as information relating to market shares and concentration is concerned, subsection 92(2) of the *Competition Act* prevents the Tribunal from making an order solely on the basis of such evidence. Accordingly, we do not intend to adopt "likely challenge" market share and concentration bright lines. Nevertheless, given that high market share is a necessary condition that must exist before anticompetitive outcomes can result from a merger, the Bureau's Guidelines will set forth a market share "safe harbour" and a concentration "safe harbour" bright line in CR4 terms. It is evident that, *inter alia*, a merger will be increasingly likely to raise concerns as the market share or concentration levels rise above these levels.

Finally, in Part V of the Guidelines, the Bureau will describe its approach to the efficiency exception provisions that are set forth in section 96 of the Act. In very general terms, efficiency gains that are not redistributive in nature and that would not likely otherwise be attained are balanced against the dead-weight losses attributable to the likely prevention or lessening of competition that will result from the merger. However, this approach would be adapted to account for matters such as: (i) qualitative efficiency gains and anticompetitive effects; (ii) timing differences between the gains and the losses; and, (iii) the fact that the costs savings may not be generally realized across the entire market.

To summarize, this update on merger law in Canada addressed three major considerations:

1. Statistically, we believe merger activity in Canada will continue at a high level.
2. The *Competition Act*, including portions dealing with mergers, is presently under court challenge, but enforcement has not as yet been seriously impacted.
3. We soon will be issuing Merger Enforcement Guidelines, which will make merger analysis more transparent and increase public confidence in the Bureau's merger review process.

Merger enforcement is not a precise science. It poses challenges not only for anti-trust authorities but also for the parties who want to see their transactions finalized as quickly as possible. A set of Canadian guidelines should reduce misunderstandings, better focus information collection and



analysis, lead to better and faster merger decisions by anti-trust officials, and result in Canadian mergers that support our competitive position domestically and worldwide. I am confident that the publication of the Bureau's Merger Enforcement Guidelines will, over time, provide these benefits.

Thank you.

(Version française disponible)

# Speech



Consumer and  
Corporate Affairs Canada

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et Corporations Canada

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**CANADIAN COMPETITION LAW:  
CURRENT ISSUES IN CONSPIRACY LAW AND ENFORCEMENT**

Notes for an Address

by

Howard I. Wetston

Director of Investigation and Research

~ Bureau of Competition Policy

Consumer and Corporate Affairs Canada

Meredith Memorial Lectures

McGill University

Montreal, November 30, 1990







## I. INTRODUCTION

Throughout much of the 1980s, enforcement of the criminal conspiracy provisions of Canadian competition law was overshadowed by the focus on developing, enacting and implementing an effective non-criminal law to deal with mergers and monopolies. With this task completed, the time is opportune to revisit the subject of our Canadian law against price-fixing and other collusive arrangements, and reaffirm its fundamental role in the modern antitrust enforcement agenda.

Collusive arrangements have been viewed by Parliament as serious criminal offences, and this is reflected in the treatment accorded to them under the *Competition Act*. There are at least two reasons for social condemnation of collusive behavior, one readily apparent, one perhaps less so.

Unlike other conduct addressed by competition law, bid-rigging, price-fixing and related activities are widely recognized to be unambiguously harmful. There are no redeeming social benefits. In many cases, the conduct of conspirators amounts to a form of theft from the public on a multi-million dollar scale.

Moreover, as this paper seeks to demonstrate, collusion has even broader and more pervasive effects on the nation's economic activities. While these effects can be difficult to quantify, economists have long recognized their relevance in making the case for a strong conspiracy law. If these effects are better understood by the public, then uncovering and deterring these activities will become more feasible.

Domestic economies and businesses are facing sweeping changes as the 1990s begin. These include the globalization of markets, the trend to deregulation, the dismantling of trade barriers in North America and the European Community, and the shift from a centrally planned economy in the Eastern bloc. Developments on the world stage necessitate that Canadian firms strive towards greater efficiency, both as a key to improved international competitiveness and as a means of countering the stronger role that imports will inevitably play in the domestic economy. Within this context, competition and free market forces offer the greatest potential to foster dynamic innovation and economic growth in the decade ahead.<sup>1</sup>

Unfortunately, history has shown that many businesses, over the years, have pursued the shelter of collusive arrangements as a retreat from the challenge of the marketplace. Needless to say, collusive arrangements do not provide Canadian firms the best hope for international success. This may be an appropriate time, therefore, to present the economic arguments which support vigorous enforcement of the conspiracy law, to review the application of our present law and the current approach, and to discuss the factors that will shape its enforcement in future years.

## II. ECONOMIC ASPECTS OF COLLUSION

### (1) The Effects of Collusion

Canadian competition policy is based on the notion that free market forces, operating under competitive conditions, are the best means of allocating resources in the economy and maximizing total economic welfare. Competition is viewed as a dynamic process, in which constant pressure to improve and adjust to changing consumer

demands or market conditions can only be met by firms operating in a flexible, unrestrained setting. It is the force which drives industry forward.

Collusion strikes at the core of this process. By suppressing the natural rivalry of firms, collusion enables them to function as a collective monopoly or cartel. This imposes serious costs not only on consumers, but on other businesses, government, and the economy as a whole. As economists say, it reduces total economic welfare. Ultimately, collusion harms the interests of all Canadians, a fact which may set it apart from other forms of white-collar crime.

To begin with, by establishing collective control over the behavior of the firms involved, collusion enables them to reduce output and/or to raise prices above competitive levels. This has an immediate, negative impact on the welfare of consumers--the so-called deadweight loss attributable to monopoly. This is a loss that consumers bear directly. They are worse off because they are consuming less and paying more for the relevant products than they would under competitive market conditions. In addition, collusion unjustly transfers wealth from consumers to corporate shareholders. An agreement to raise the retail price of a consumer product is the classic example of this form of injury.

Collusion is also harmful to Canadian businesses because it raises the price or reduces the availability of intermediate goods or other inputs such as resources. This impacts directly on the businesses' profitability and on the attractiveness of their products vis-à-vis those offered by foreign suppliers. Firms who must pay a premium for raw materials due to prices set by collusion suffer a serious cost disadvantage that is inevitably reflected in their own selling price. For example, in one case currently underway, a Canadian firm publicly reported that its costs were increased by 3 to 5 percent due to price increases alleged to be linked to a price-fixing agreement.

Bid-rigging is another type of activity where the effects of collusion can be clearly demonstrated. For example, bid-rigging in the U.S. highway paving industry has been widely reported as having resulted in overcharges of more than \$260 million annually in that country. Here in Canada, it was estimated that purchasers in a western Canada bid rigging case paid premiums of between 20 and 137 percent on rigged bids. As these examples illustrate, the costs of a large firm's operations, or more frequently of government operations, can be severely affected when the system of competitive tendering, designed to secure best value for money, is undermined. In the end, either taxpayers must face higher taxes or scarce government resources must be reallocated from other worthwhile projects to cover the extra costs caused by collusive bidding.

Collusion also has critical effects on the dynamic forces that spur efficiency and innovation. By suppressing the normal competitive forces that foster productivity improvements, collusion can result in technical inefficiency in the form of higher per unit costs.<sup>2</sup> There is also reduced scope for innovative marketing strategies and competitive experimentation, and the incentive to engage in research and development may be limited. These effects

are precisely the opposite of what is needed to foster the efficiency and international competitiveness of Canadian industry.

Another harmful aspect of conspiracy is that the colluding firms may tend to set prices at the level necessary to benefit the highest-cost participant. Inefficient players may thus be protected, while normal market forces would have removed them from the marketplace.

The damage caused by collusion is not confined to individual consumers or industrial sectors. The potential relationship between an effective competition law and the achievement of broader economic goals cannot be overlooked. Conspiracy law, in particular, helps to prevent artificially high price levels across the economy. Moreover, by encouraging greater efficiency and economic growth, competitive conditions can enhance international performance, contribute to the attainment of full employment, and overall help to provide a better standard of living for Canadians.

Finally, in addition to its direct economic costs, collusion is harmful because it undermines public confidence in the competitive market system. It erodes the belief that the system is based on honest dealings and ultimately works to the benefit of consumers. If left unchecked, therefore, collusion could lead to other forms of government intervention in the marketplace.<sup>3</sup>

For all these reasons, a clear majority of scholars, including individuals who have been critical of other aspects of antitrust policy, strongly support the systematic prohibition of collusive activities. For example, Robert Bork, who has criticized numerous aspects of U.S. antitrust policy as excessively interventionist, has described the U.S. law against price-fixing as providing an enormous contribution to consumer welfare over the decades.<sup>4</sup> In a similar vein, Posner concludes that "the elimination of the formal cartel is an impressive, and remains the major, achievement of American antitrust law."<sup>5</sup>

## **(2) Factors that Facilitate Collusion**

Economists have suggested a number of factors that can facilitate the formation or operation of cartels. These factors are present in many Canadian industries, which suggests that enforcement officials need to be particularly alert to the possibility of collusive agreements in Canada. The result may be that natural marketplace mechanisms which can work to defeat the successful attainment or maintenance of conspiracies are not present, and agreements reached may have a better chance of survival.

It is widely believed that the fewer the number of firms, the easier it is to establish and police a cartel. This is partly because, the greater the number of players in the market, the more likely there will be diversity among firms' cost structures, and the less likely that each will view a particular price as the appropriate one.<sup>6</sup> Higher industry concentration levels are also thought to facilitate effective collusion. Many Canadian markets present this risk factor. Due to the country's relatively small and widely dispersed population, Canadian markets tend to be small and tend to be highly concentrated.



Collusion is also made easier where an industry's products are homogeneous. When firms sell undifferentiated products, the number of variables which they must agree upon is reduced. In Canada, a significant proportion of the domestic economy is made up of resource-based industries where this kind of product homogeneity is often found.

Beyond these factors, collusion may also be facilitated by characteristics such as the dispersion of buyers and the nature of transactions in the marketplace. In particular, the frequency of transactions and the value of individual sales may affect the ability and incentive to engage in secret discounting.

Collusion can also be greatly facilitated by a variety of other practices that limit the ability of individual firms to "cheat" on their co-conspirators, a practice which can lead to the eventual breakdown of any cartel. Practices used to prevent cheating may include price posting and open-pricing policies, the allocation of specific buyers or geographic markets to particular suppliers, the maintenance of market shares, the pooling of profits, or the use of most-favoured-nation (buyer) clauses, which require price cuts to be passed on to all customers. Such measures enhance the transparency of business transactions and thereby make it easier to enforce an agreement.

In recent years, these practices have been an important focus of antitrust enforcement activity. For example, most-favoured-nation and other collusion facilitating practices were the focus of the 1984 U.S. *Ethyl* case.<sup>7</sup> This case considered whether the non-collusive adoption of such pricing policies by the only four market participants could constitute a violation of the *Federal Trade Commission Act*.

Additionally, collusion may be facilitated by the existence of a trade association. Such associations provide a natural vehicle for monitoring compliance with cartel arrangements such as by collecting and disseminating information on suggested or prevailing prices or on industry costs. Trade associations have figured prominently in recent cases involving lawyers, real estate agents, and trucking services.

### **(3) Beneficial Co-operation Between Competitors**

While remaining vigilant against harmful manifestations of collusion, it is important to recognize that not all joint activities or agreements involving competitors fall into this category. In fact, some such arrangements may serve pro-competitive functions. For example, the development of common product standards can facilitate efficient transactions in the marketplace and enhance brand substitutability, thereby providing more options for consumers. In addition, subject to appropriate restrictions, agreements among firms to collaborate in the area of research and development can enhance technological innovation in an industry. Specialization agreements can contribute to the beneficial rationalization of industries. The pro-competitive potential of each of these activities is recognized in one way or another in the existing provisions of the *Competition Act*.<sup>8</sup>



Another justification that is often advanced for agreements among firms is the need to compete effectively in global markets. This rationale must not be accepted blindly. Many writers have argued to the contrary--that vigorous competition in the domestic market is important to position firms to meet the tests of international competition.<sup>9</sup> Nevertheless, it is recognized that in appropriate cases, joint ventures or other collaborative arrangements among competitors can enable firms to mount a more effective marketing effort or achieve synergies that make it possible to compete more effectively. Also, where markets are genuinely international in scope, agreements for solely export-related purposes are unlikely to significantly restrict competition in the domestic market.

Some economists have made more far-reaching assertions regarding the need for co-operation among competitors to ensure efficient market outcomes in certain circumstances.<sup>10</sup> However, while these views raise interesting issues for industrial organization theorists and policy makers, they are still regarded with considerable caution in the antitrust enforcement field. In practice, it would be very difficult to distinguish cartel arrangements which are arguably justified by efficiency-related considerations from those that serve no purpose but to transfer wealth from buyers to sellers. Furthermore, if such arrangements were exempted from the general law on conspiracy, elaborate regulatory structures might be needed to prevent them from going beyond their legitimate functions.<sup>11</sup>

In sum, economic theory and the empirical evidence regarding the social costs of cartelization strongly support the systematic prohibition of horizontal price-fixing, market sharing and other collusive activities. Recent developments in oligopoly theory can help to identify markets in which collusion is most likely to occur. Many Canadian markets fall into the risk category, suggesting particular vigilance in enforcement is required. At the same time, however, the Government recognizes that the law against conspiracy should leave room for limited arrangements between firms in regard to specific activities, such as standard-setting and research and development, which are likely to be efficiency-enhancing.

### III. ISSUES IN THE APPLICATION OF THE CANADIAN LAW

#### (1) Overview of Provisions

The general legal prohibition against conspiracies in restraint of trade is currently found at section 45 of the *Competition Act*. The provision declares that it is an indictable offence for any person to conspire, combine, agree or arrange with another person to prevent, limit or lessen competition unduly. The Act provides a limited defence applicable to agreements relating to matters such as the defining of product standards or the exchange of credit information--areas where co-operation may be expected to produce pro-competitive efficiencies. However, the defence is not applicable where such an agreement is nonetheless likely to lessen competition unduly in respect of prices, quantity or quality of production or certain other critical dimensions of competition.

This section does not prohibit any or all types of agreements outright, necessitating an assessment of the likely effect of the agreement on a case-by-case basis. While complicating the task of conspiracy law enforcement, the Canadian *threshold* approach reflects an historical acceptance of concentration and a concern that government intervention only occur when restrictions have clear undue competitive effects. However, the wording of section 45 also gives flexibility to the law by accommodating the notion that market dynamics play an important role in determining what level of structural concentration will be harmful to competition. This can be particularly important in assessing the impact of agreements pertaining to subjects such as advertising, or other non-price dimensions of competition.

The *Competition Act* contains two other measures directed against collusive agreements. First, there is a specific per se prohibition against agreements relating to bid-rigging activities. Section 47 prohibits agreements to refrain from submitting a bid in response to a call or request for tenders, and also prohibits the submission of bids arrived at by agreement in response to a call or bid for tenders. It is an indictable offence to engage in such activities. The section does not, however, apply to situations where the agreement is made known to the tendering authority before bids are made, or where the agreement involves affiliated companies.

This provision was added to the law in 1976 to overcome difficulties which had been encountered under the general conspiracy law in proving that bid-rigging practices would unduly lessen competition. It was found that many bid-rigging allegations implicated small firms who had only a small share of the market, but who nonetheless had been the only parties to respond to the call for tenders.<sup>12</sup> However, the per se treatment of bid-rigging also reflects widespread societal condemnation of this conduct. Mr. Justice McKeown described bid-rigging in the tender for government hotel accommodation as a "public scandal" in *R. v. York Hannover Hotels Ltd. et al.*<sup>13</sup>

Under section 49 of the Act, agreements between banks regarding matters such as the rate of interest on deposits or loans also currently receive per se treatment. Such agreements are not subject to the general conspiracy section. While the special treatment accorded agreements between banks is an historical anomaly, public acceptance of the per se standard in this industry may be attributed to a recognition of the fundamental importance of the banking system, and particularly the need to ensure that capital is allocated in accordance with free market forces. This treatment will similarly be extended to federally-incorporated trust and loan companies if Bill C-83, the proposed *Trust and Loan Companies Act*, is passed into law, considerably expanding the scope of application of section 49.

## (2) Investigative Issues

Conspiracy and bid-rigging activities have accounted for roughly one-third of the Bureau of Competition Policy's workload since the 1960s, a situation which is likely to continue well into the 1990s. Despite increased efforts to promote awareness and

understanding of the law, some Canadian firms continue to engage in conspiratorial behavior. Seven major conspiracy investigations are currently underway in the Bureau relating to price-fixing or bid-rigging activities.

Certain realities of the enforcement process remain unchanged. Conspiracy cases remain the most difficult ones to investigate, due to the inherent difficulties in detecting covert arrangements, the higher evidentiary burden of proof in criminal cases, and the scope and complexity of conspiracy investigations. There is a considerable spectrum of behavior ranging from explicit written agreements to informal arrangements which the law might potentially address. While the *Competition Act* allows both direct and indirect evidence of conspiracy, most conspiracies must still be proven through an intensive process of drawing inferences from circumstantial evidence.

Searches are still necessary in the vast majority of conspiracy cases, with the accompanying increase in resource demands associated with the pre- and post-search documentation requirements introduced by the 1986 amendments. Litigation in the matter of *Cottrell Transport Inc. v. Canada* has resolved some issues of interpretation concerning document retention proceedings.<sup>14</sup> New questions, however, will undoubtedly continue to arise. In particular, the Bureau is still exploring the ramifications resulting from the need to search for records stored on computers.

Given the degree of concentration in many Canadian industries, the treatment of conscious parallelism is an ongoing concern. In economic theory, conscious parallelism refers to the uniformity of behavior, whether in pricing or in other areas, commonly exhibited by firms in an oligopolistic industry selling a homogeneous product, such as gasoline. Uniformity arises not from agreement but from each firm taking account of its rivals' likely reaction in determining business strategies--recognizing that a price cut will be matched by all and produce only a brief competitive advantage. Because of the apparent prevalence of this phenomenon here in Canada, and the tendency of consumers to view price uniformity as inherently suspicious, the Bureau receives a considerable number of complaints of this type each year.

Canadian courts have not accepted that mere conscious parallelism is sufficient to attract the application of the law, absent evidence of an agreement.<sup>15</sup> In practice, however, collusion and conscious parallelism can be difficult to distinguish, particularly in industries where vehicles to facilitate price-fixing are readily available. The Bureau scrutinizes such situations when they are brought to its attention to determine whether there is other evidence, such as meetings or other means of communication between competitors, suggesting a possible agreement or evidence of reprimands or apologies for non-conforming behavior. Given the potential significance of interdependent behavior in other areas of competition law, the Bureau's draft Merger Enforcement Guidelines, which were circulated for comment in November 1990, explicitly address this matter.



### (3) Charter and Constitutional Litigation

As is often the case in Canada, Charter and other constitutional challenges have been raised recently with respect to several provisions of the Act, some of which have been directed at the conspiracy provision. In the recent case of *R. v. Nova Scotia Pharmaceutical Society (PANS)*<sup>16</sup> the Supreme Court of Nova Scotia struck down section 45 on the basis that two elements of the offence, the requirement of undueness, and the mens rea or intent element, violated certain sections of the Charter of Rights.

Conspiracy under the *Competition Act*, as at common law, is an inchoate offence consisting of the act of agreeing to do something. As the offence lies in the agreement and not in its implementation, numerous courts have concluded that the mens rea element is met when it is shown that the parties intended to enter and did enter into the subject agreement. It is not necessary to demonstrate that the accused intended to lessen competition unduly. In *PANS*, it was held that this single intent requirement would give rise to situations where it would be possible to convict an accused despite a reasonable doubt as to whether the accused knew or ought to have known that competition would be lessened unduly as a result of entering into the agreement. This was judged to conflict with notions of fundamental justice protected by section 7 of the Charter, as it would result in the conviction of the morally innocent. In addition, the Court agreed with defence counsel submissions that the meaning of the word "unduly" was too vague and uncertain. Consequently, it was considered to deprive the accused of its rights to fundamental justice, to make full answer and defence, and to a fair trial (sections 7, 11(a) and 11(d) of the Charter).

The application of the intent and "undueness" requirements have been the subject of much discussion in the past. On the question of the meaning of undueness in particular, the courts over the years have devoted considerable attention to identifying factors which can serve to establish a framework for its assessment. Moreover, considerable guidance can be obtained from the provisions of the Act itself.

Challenges such as *PANS* are not, however, wholly unexpected, given that the courts are continually expanding the jurisprudence pertaining to procedural rights protected by the Charter. These are significant issues in competition law cases. Furthermore, it is not surprising that corporations that possess the financial resources to test the limits of the law choose to do so.

At this point in time, challenges such as this raise obstacles of a practical nature. They inevitably deflect effort and resources from the fundamental task of investigating such crimes. However, despite these matters, the Bureau is proceeding with investigations of collusive activities in Canada, and intends to continue referring evidence of offences to the Attorney General of Canada. As the trial decision in *PANS* is not binding, proceedings in conspiracy cases will continue to be initiated.

#### (4) Penalties

One of the most significant conspiracy law issues in the 1990s will be the quest for appropriate penalties. The sanctions which may be imposed for collusion in Canada are among the highest in the world. Under the general conspiracy provision, both corporations and individuals may be sentenced to fines up to ten million dollars, while individuals may be sentenced to jail terms of up to five years. Fines for bid-rigging agreements are not constrained by a monetary upper limit and may be set at the discretion of the court, although the maximum prison sentence is also five years.

In practice, the fines awarded by Canadian courts in conspiracy cases have not nearly approached the levels provided for by law. While deterrence has been emphasized as a fundamental sentencing issue in competition law cases, it is unlikely that the present level of fines has even begun to achieve this purpose. Indeed, it can be argued that to date, the fines have functioned as little more than a licence fee.<sup>17</sup> The highest monetary penalty imposed to date on an individual firm for a single count under the conspiracy provision of the competition legislation is \$400 000. Factors frequently referred to as determinative in sentencing decisions include the size of the firms involved and their share of the market, the duration of the conspiracy, the nature of the product involved, the degree of control achieved by the agreement, and the relative involvement of various participants in promoting the agreement.

Canadian courts have traditionally treated individual conspirators in competition law cases with greater lenience than their counterparts south of the border. Although about forty individuals have been convicted of "combines" offences since 1940, individual fines have not exceeded \$7 500 to date. These penalties stand in sharp contrast to the heavy fines and prison sentences which are frequently awarded to individuals found guilty in conspiracy and bid-rigging cases in the United States.

The penalties awarded by the Canadian courts in conspiracy cases are also in contrast to the million dollar fines and three- and five-year prison sentences handed down in the Hamilton Dredging case in 1979. This case involved charges laid under the Criminal Code against several parties involved in a conspiracy to defraud the Government through a significant bid-rigging scheme. Charges were laid under the Code as no separate bid-rigging offence existed under the competition law at that time. In fact, there is little to distinguish this case from many other conspiracy offences despite the greater stigma sometimes associated with charges under the Criminal Code.

Greater compliance with antitrust laws will come about only when penalties are sufficient not only to appropriately punish collusive behavior once detected, but also to deter other persons from engaging in such activities. Successful deterrence of such crimes requires that penalties be greater than the expected profits from successful collusion. If the penalties only equal the actual profits reaped by the defendants in individual cases, they will not be sufficient. We know that the crime of robbery would not be



adequately deterred if convicted persons merely faced the prospect of having to return their stolen property to society.

Collusion is also unlikely to be adequately deterred if the penalties awarded in such cases are paid directly or indirectly by the corporations involved, rather than by the executives responsible for the decision to break the law. As indicated, the prosecution and conviction of individual corporate offenders, and the potential for severe penalties for such individuals, are part of the deterrence package available under the law. These measures must be seen to be real risks of illegal behavior, rather than mere symbolic penalties.

Accordingly, an increase in the incidence of individuals charged under the conspiracy or bid-rigging provisions is a necessary by-product of achieving deterrence. The Bureau is now conducting its investigations with a view to identifying cases where individual charges would be appropriate, and gathering evidence which would support such action. The criteria relied upon by the Bureau in making its recommendations to the Attorney General in such cases include the position of the individuals in the organization, his or her role in initiating, implementing or enforcing the agreement and the degree of knowledge of illegality, or moral turpitude of the particular party. Recently, charges were laid against seven corporate officers in the pharmaceutical price-fixing case currently before the courts in Quebec.

Ultimately, however, penalties can only reflect society's condemnation of the conduct in question. Efforts to increase them will only receive acceptance when there is greater understanding of the serious harm caused by collusive activities. As we have seen, these effects are felt not only by individual consumers, but also by firms who must purchase critical inputs at inflated levels, by taxpayers who bear the price of bid-rigging in government procurement and by all members of Canadian society who are affected by these types of activities. These effects must be understood and accepted by the purchasing public, businesses of all sizes, and, of course, the judiciary.

#### **(5) Enforcement Approach**

Effective deterrence requires not only appropriate penalties, but also a reasonable degree of certainty that they will be swiftly imposed--a prompt and unequivocal response. It is possible that in the past the deterrent effect of competition law investigations was somewhat reduced by the length of time which elapsed between the commission of an offence and the imposition of legal sanctions.

Recently, the Bureau has revised its approach to these investigations to ensure enhanced organizational efficiency and a prompt enforcement response. The new approach encompasses some computerized document processing and analysis techniques, improved officer training in investigative techniques, greater reliance on a team or multi-disciplinary approach, and, where possible, earlier involvement of legal counsel in the investigative process. This latter measure has produced considerable time savings by enabling shortcomings in the case to be identified at an earlier stage, and by facilitating the review of search warrants, requests for witness

immunity and other matters. This means that the Bureau has opened its doors to accused parties before the evidence is all in, in the interest of promoting discussions of benefit to both sides.

Although prohibition orders have been relied upon to resolve some conspiracy cases over the years, these and other forms of compliance resolutions will be less available in cases under the conspiracy and bid-rigging provisions. Moreover, without revisiting the facts on a case-by-case basis, it is fair to say that most instances in which prohibition order settlements without conviction were accepted involved either special extenuating circumstances related to the certainty of a successful prosecution, the unusual or far-reaching effect of the proposed order, or the local nature of the offence. While future cases will, of course, be judged on their own merits, we continue to view conspiracy and bid-rigging as the most serious of competition law offences, and the ones most deserving of full enforcement measures.

#### **(6) Private Litigation**

Since the Bureau seeks to discharge its mandate by the most efficient means possible, it does not have sufficient resources to take on all cases which may exist, and must inevitably focus its activities on those areas of greatest significance. In the U.S., the effectiveness of antitrust enforcement has long been assisted by the high level of private litigation. Civil suits have greatly increased the costs of anticompetitive activity, due largely to potential treble damage awards. In addition, they have greatly increased the probability of antitrust offences being exposed and sanctions being imposed.

Since the constitutionality of the civil damage remedy was upheld by the Supreme Court of Canada in *General Motors of Canada v. City National Leasing*<sup>18</sup>, firms here now clearly face potential exposure to civil liability for the financial damages suffered by customers or competitors as a result of a conspiracy. The provision in the *Competition Act* enables firms to pursue private litigation where they can demonstrate losses arising from conduct that is contrary to any of the criminal offence provisions of the Act. Litigants benefit from the lower civil standard of proof, and may recover the full costs of any investigation in connection with the matter as well as those related to the proceedings. Although Canada has no treble damage rule, a sizeable award may nonetheless flow from a successful and prolonged criminal violation.

In future years, it is hoped that fear of potential civil liability will become an important additional deterrent to illegal conduct. However, this will come about only if firms affected by collusive behavior make use of the opportunity now unquestionably available to them, and pursue such litigation vigorously, rather than relying solely on government enforcement.

#### **(7) Future Directions**

In the decades ahead, conspiracy law enforcement will be influenced not only by domestic developments and priorities but also by international trends. To begin with, greater competitive pressures will be exerted by international sources on industries

that previously were sheltered by government intervention or regulation. The need for structural adjustment of the Canadian economy to the forces of globalization and freer trade will provide further impetus to focus on the removal of competitive restraints arising from collusion.

Some might argue that trade liberalization will break down collusive behavior. If this is so, it will not happen immediately. Foreign firms will likely take time to identify inefficient and sluggish competitors and target them. In the interim, consumers bear the full cost of these practices. Moreover, there will likely always be some sectors of the economy where markets are local in nature. Consequently, increasing international competition is not viewed as a plausible ground for limiting conspiracy law enforcement.

Second, Canadian firms can be expected to pursue international strategic alliances and other co-operative arrangements as a means of realizing economies of scale not attainable in the domestic market, and as a vehicle to gain improved access to foreign customers. The proliferation of such arrangements, and the internationalization of markets in many industries, will inevitably affect the analysis of antitrust issues such as market definition, entry barriers and the countervailing influence of foreign firms on domestic market power. The Bureau's approach to many of these matters is articulated in the draft set of Merger Enforcement Guidelines that has recently been released.

Third, business arrangements of an international dimension create enhanced potential for the incidence of conspiracies involving multi-country participants. The cost and complexity of conspiracy detection may well rise as evidence-gathering becomes a multi-country project. The Bureau may need to build on existing co-operative arrangements with antitrust authorities in OECD countries and develop links with other national antitrust authorities to enable successful investigations of international scope. The Canada-United States Mutual Legal Aid Treaty, which provides a formal mechanism to obtain assistance in the investigation and prosecution of indictable offences in either country, is a good example of international co-operation in this regard.

Finally, in an age of stateless corporations, the Canadian antitrust enforcement climate must be recognized as one of the package of factors that may influence the choice of firm location. We are currently witnessing an increasingly pro-active enforcement stance in numerous industrialized nations including the United States, Germany, France and Japan. Moreover, antitrust legislation is currently being introduced into Eastern bloc countries as part of the shift from a centrally planned economy. While there is a clear consensus on the importance of effective legal prohibitions against conspiracy, it is possible that divergences between countries in competition law and enforcement practices could affect international trade flows or injure international co-operation.

Canadian competition law is currently on the right track. It prohibits harmful collusive activities without deterring beneficial co-operative research and development initiatives or other pro-competitive business arrangements falling within the exceptions



to the conspiracy offence. However, international trends towards stiffer fines for corporate and individual offenders emphasize the importance of ensuring that Canadian sanctions are not perceived to be low compared to other countries.

#### IV. CONCLUSION

Collusion is justifiably regarded as a serious crime in most industrialized nations. The reasons for this are well-documented and overwhelmingly persuasive. While conspiracy law enforcement is scarcely a new development, and most firms are undoubtedly aware of the basic parameters of the law, the continued occurrence of these crimes remains a major concern. Throughout the industrialized world, we are now witnessing a renewed commitment to the vigorous enforcement of conspiracy offences.

This commitment is based on widespread acknowledgement that the competitive process is the most effective stimulus to growth, innovation and efficiency on the part of individual firms, and is ultimately the best means of ensuring continued effective economic performance in a rapidly changing world. To the extent that collusion tends not only to raise prices and restrict output, but also blunt the competitive pressures that stimulate efficiency, conspiracy law has an important role to play in the decade ahead.

(Version française disponible)

NOTES

1. For a fuller discussion of relevant international trends, and their implications for competition law as an aspect of the legal and policy framework for the national economy, see Bureau of Competition Policy, *Canadian Competition Policy: Its Interface with Other Economic and Social Policies* (Hull, Quebec: Consumer and Corporate Affairs Canada, 1989).
2. Some qualification is appropriate regarding this point. It is recognized that cartelization does not necessarily eliminate the incentive for firms to control their costs, since lower costs can still help to achieve higher profits. However, by reducing the scope for innovative marketing strategies and experimentation, and encouraging rent-seeking by monopolistic input suppliers (e.g., labour), collusion (or monopolization) often reduces firms' ability to control their costs. For related discussion, see Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (Glenview, Illinois: Little, Brown Higher Education, 1990), pp. 102-103.
3. This concern is emphasized in Chris Green, "Industrial Organization Paradigms, Empirical Evidence and the Economic Case for Competition Policy," *Canadian Journal of Economics*, vol. xx, no. 3, August 1977, pp. 402-505.
4. Robert H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1976), p. 263.
5. Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976), p. 39.
6. F.M. Scherer, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin Company, 1980, second edition), p. 199.
7. *E.I. Du Pont de Nemours v. FTC* (2nd Cir., 1984). The FTC's initial decision prohibiting the use of these practices was overturned on appeal.
8. See the *Competition Act*, sections 45(3) and 57.
9. See, in particular, Michael E. Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990). See also Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: The Queen's Printer, 1969), p. 22.
10. See, for example, Donald Dewey, "Information, Entry and Welfare: The Case for Collusion," in *American Economic Review* vol. 69, no. 4, 1979, pp. 587-594. Dewey suggests that by reducing uncertainty, the sharing of information among firms can facilitate efficient investment and production decisions. See also Lester G. Telser, "Cooperation, Competition and



Efficiency," *Journal of Law and Economics*, vol. 28, 1985; and George Bittlingmayer, "Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Cast," *Journal of Law and Economics*, vol. 25, 1982. Telser and Bittlingmayer suggest that in many industries with high fixed costs, a stable competitive equilibrium may not exist.

11. See John Shepard Wiley Jr., "Antitrust and Core Theory," *The University of Chicago Law Review*, vol. 54, no. 2, Spring 1987, pp. 556 to 589.
12. "Background Papers: Stage 1 Competition Policy" (Ottawa: Bureau of Competition Policy, Consumer and Corporate Affairs, 1976).
13. Unreported decision of the Ontario High Court, April 27, 1988.
14. *Cottrell Transport Inc. v. Director of Investigation and Research and Attorney General of Canada* (1988), 19 C.P.R. (3D) 308 (Ont. C.A.).
15. See *R. v. Canadian General Electric Company Limited et al.* (1976) 75 D.L.R. (3d) 664 (Ont. H.C.).
16. *R. v. Nova Scotia Pharmaceutical Society et al.* (Supreme Court of Nova Scotia, September 5, 1990). This judgment is currently under appeal.
17. For pertinent discussion, see *R. v. Shell Canada Products Limited* (Manitoba Court of Appeal, February 8, 1990). This decision considered the appropriate fine to be levied for a violation of the criminal price maintenance provision of the *Competition Act*.
18. (1989) 24 C.P.R. (3D) 417.



# Speech



Consumer and  
Corporate Affairs Canada

Consommation  
et Corporations Canada

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Notes for an Address

By

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Director of Investigation and Research

Bureau of Competition Policy

Consumer and Corporate Affairs Canada

to the

Canadian Corporate Counsel Association

Calgary, August 19, 1991



## INTRODUCTION

I am pleased to be here this afternoon and to present some thoughts on the Bureau of Competition Policy's current enforcement agenda. I feel it is particularly appropriate to be making this presentation to you because many of you are in the unique position of providing or seeking practical advice about competition policy issues on a daily basis. The matters I am about to discuss are the most recent among a number of initiatives that the Bureau of Competition Policy has undertaken to enhance compliance with the *Competition Act* and improve the effectiveness of the enforcement process. By discussing these matters with you today, I hope to provide the business community and practitioners with additional guidance on how we in the Bureau administer Canada's competition law.

The two subjects I will be discussing are:

- (1) the most recent development in the Bureau's program of compliance; specifically, our current thinking on recommending immunity from prosecution to the Attorney General where corporations voluntarily bring competition law violations to our attention; and
- (2) the development of criteria for case screening and prioritization by the Bureau to promote the more effective allocation of resources in the administration of the *Competition Act* and thereby ensure the attainment of its objectives.

To begin with, I would like to describe the context in which the Bureau fulfills its mandate. As you may know, the Director of Investigation and Research is an independent statutory official appointed by order-in-council. The Director is the head of the Bureau of Competition Policy, which is part of the Department of Consumer and Corporate Affairs. While the Director reports to Parliament through the Minister of Consumer and Corporate Affairs, he is solely responsible for fulfilling the statutory responsibilities attributed to him under the *Competition Act*.

Although the Director is responsible for the enforcement of the *Competition Act* and the management and administration of the Bureau of Competition Policy, he must work within the bounds of, and is affected by, the same fiscal restraint facing the federal government generally. Obviously, I do not have unlimited resources to pursue competition matters. The law has, however, conferred upon the Director considerable discretion with respect to enforcement policy, compliance policy, priorities and so on.



## COMPETITION BUREAU PRIORITIES

Canada's *Competition Act* is an important component of the federal government's marketplace framework policy. As you know, its scope of potential application is extremely broad and covers virtually all sectors of business activity. As a result, the expression 'doing more with less' is, for us at the Bureau, more than just a currently fashionable phrase; it is a constant imperative that derives from the necessarily broad scope of an effective competition policy. We must therefore continuously strive to focus our enforcement activities in a manner which best promotes a competitive marketplace and, as a direct consequence, a productive economy.

It is with this perspective in mind that I have stated, on several occasions, that we are placing an increased emphasis on the enforcement of the conspiracy, bid-rigging, abuse of dominance and merger provisions of the Act. The reason for giving a special priority to the enforcement of these provisions flows directly from the 'purpose clause' of the *Competition Act* itself. It emphasizes, among other objectives, the promotion of the efficiency and adaptability of the Canadian economy. The same may be said with respect to the misleading advertising and deceptive marketing practices sections, as these provisions also promote economic efficiency in purchasing decisions. I am nonetheless fully aware that the Bureau will continue to receive complaints relating to the other provisions of the Act, and that it is incumbent upon me to ensure that all the objectives of the Act are met as fully as possible.

I have spoken at length on many occasions about the administration of the merger provisions of the *Competition Act*. Therefore, I don't propose to do that today. Rather, I would like to discuss some aspects of our enforcement approach with respect to the other priority areas that I mentioned a few moments ago.

On the criminal side, we have chosen to focus our attention on horizontal restraints such as conspiracy and bid-rigging. These activities strike at the very heart of a dynamic and efficient market economy by suppressing rivalry among firms and enabling them to function as collective monopolies or cartels. These practices impose serious costs, not only on consumers, but on business, government, and the economy as a whole. They reduce total economic welfare by creating strong disincentives to innovation, to improving production efficiencies, and to increasing the quality and choice of goods offered. Moreover, there is a growing body of economic research indicating that these activities may also reduce the ability of Canadian businesses to compete internationally. Our concern with abuse of dominant position on the civil side is essentially driven by the same considerations.

I should point out that we are not alone in focusing our attention on horizontal restraints, and it is something that Canadian businesses should bear in mind as our economy becomes more closely integrated with that of the United States under the Canada-U.S. Free Trade Agreement. The United States Assistant Attorney General in charge of anti-trust, Jim Rill, has stated that the investigation and prosecution of price-fixing, bid-rigging and other types of cartel behaviour are among his highest priorities. He has also stated his intention to seek significant jail terms for individuals and substantial fines for corporations.

To illustrate the seriousness with which the American authorities view cartel behaviour, I need only remind you of the ongoing investigation and prosecution of U.S. dairy companies for bid-rigging in connection with milk sold to the U.S. Department of Agriculture for use in subsidized school lunch programs. As of a few weeks ago, the investigation had spread to at least 16 states and involved 34 cases against 44 individuals and corporations. Thus far, 16 individuals have received jail sentences and the U.S. Department of Justice is seeking fines in the order of \$21 million (U.S.).

The trend toward more severe penalties for illegal cartel activities has been felt in several other countries, including Germany and Japan. As you are probably aware, in Canada we have begun to see an increase in the level of fines imposed in bid-rigging cases, as well as in instances of price maintenance. It will continue to be our policy to seek substantial fines in criminal prosecutions under the Act, particularly in conspiracy and bid-rigging cases. In addition, we will continue to recommend to the Attorney General that charges be laid against individuals, where the evidence warrants doing so. Our review of cases over the past several years has led me to conclude that more charges against individuals will be necessary to strengthen deterrence incentives. Among the factors that we take into account in making such a recommendation are the individual's position in the organization, his or her role in initiating, implementing or enforcing the conduct in question, and his or her knowledge of the illegality of the conduct.

#### **PROGRAM OF COMPLIANCE - RECENT DEVELOPMENTS**

Criminal prosecution and contested civil proceedings are, of course, neither the only nor always the most effective means of ensuring compliance with Canada's competition law. The Bureau has for a number of years operated a program of compliance providing for a multi-faceted approach to attaining the objectives of the *Competition Act* without resorting to formal proceedings in each and every case. Indeed, some elements of the compliance program, such as the publication of speeches

articulating the Bureau's enforcement policies, and providing firms with advisory opinions, date back to the 1960s.

The various elements of the program of compliance have been set out more extensively in an information bulletin issued by the Bureau in 1989 and have been commented on by my predecessors and by me on many occasions. I therefore do not propose to elaborate further on this topic today, except to say that alternatives to prosecution will be seriously considered where a party satisfies the criteria set out in the bulletin. Rather, I want to focus my remarks on the proposed expansion of the Bureau's program of compliance.

My staff and I have recently begun to develop a program aimed at providing greater incentives for corporations and individuals to voluntarily report their participation in conspiracy and bid-rigging activities before they have come to our attention. Given the covert nature of these offences, they are often difficult to discover or prove without the co-operation of persons who are themselves implicated in the commission of the offence. We therefore want to do whatever we can, consistent with the fair and impartial administration of the *Competition Act*, to encourage firms to come forward as soon as possible after it has come to the attention of senior management that the firm has been involved in collusive conduct contrary to the Act.

Given the respective roles of the Director and the Attorney General in the enforcement of the *Competition Act*, it should be clear that only the Attorney General can grant immunity from prosecution under the Act. Nonetheless, the Director's recommendations have historically received careful and serious consideration by the Attorney General.

The following observations describe our most recent thoughts with respect to the factors that could be relevant in determining whether to recommend immunity from prosecution to the Attorney General in a "first-in" situation.

1. The firm must be the first to approach the Bureau with evidence of the offence in question. I do not view it as appropriate to recommend immunity from prosecution if there is an existing complaint or investigation, or if an advisory opinion has already been issued by the Bureau regarding the conduct in question.
2. The firm must provide full and frank disclosure of the facts at its disposal. There must be no misrepresentation of the material facts, which shall be confirmed by the Bureau's investigation. In particular, the Bureau's investigation should not reveal offences beyond those which have been identified by the firm.



3. The firm must co-operate fully with the Bureau's investigation and with any ensuing prosecution or other legal proceedings.
4. The evidence provided by the firm must be important and valuable in terms of any prosecution or other legal proceedings.
5. The firm must be prepared to make restitution commensurate with the facts and its responsibility in the matter.
6. The evidence must confirm that the firm took immediate steps to terminate the activity and report it to the Director as soon as it was discovered by its senior executives.
7. A prior record of anti-trust violations by the firm will be a significant factor in deciding whether to recommend immunity to the Attorney General.
8. The firm should usually be prepared to consent to the issuance of an order of prohibition of fixed duration under section 34(2) of the *Competition Act* pursuant to which the commission of an offence is admitted.
9. The role of the firm in the conduct in question will also be considered. For example, it may not be consistent with responsible enforcement of the Act or the administration of justice to recommend immunity for the instigator of criminal conduct.

It is my hope that this proposal will provide considerable incentive for firms to come forward voluntarily when senior management becomes aware of a violation of the Act. Certainly, that has been the experience in the United States in recent years. However, you should bear in mind that the carrot afforded by this extension of our program of compliance has a flip side consistent with our policy of seeking greater fines and laying charges against individuals where appropriate. In effect, while the benefits of being the first to report a violation of the Act in a conspiracy or bid-rigging situation may be considerable relative to the potential sanctions, the failure to do so will generally raise the stakes in any subsequent settlement negotiations.

These are only some of the considerations which will be relevant in the context of my recommendations to the Attorney General following a request for immunity from prosecution. I hope to be able to elaborate on this aspect of our enforcement agenda as it is further developed with the benefit of experience and of our ongoing consultations with the Attorney General's office.

## CASE SCREENING CRITERIA

Given that the Bureau cannot investigate every matter brought to its attention with equal vigour, we have been developing criteria for screening and prioritizing cases for enforcement outside of the mergers and marketing practices fields. These criteria are based on our accumulated knowledge of markets, economic principles, case law and on our enforcement experience. We have applied these criteria in our case screening process over the past year and I am encouraged by the initial results. I should stress, however, that we do not apply these criteria mechanically. Their application must be, and is, tempered by the exercise of judgment and discretion. Indeed, in view of my statutory responsibilities, I cannot fetter my discretion by adhering rigidly to any formula. Nor would I want to. Flexibility is, in my view, essential to the enforcement of competition law. The Supreme Court of Canada appears to have indirectly confirmed this in recent decisions such as *City National Leasing* and *Thompson*, by taking competition law out of the narrow confines of purely criminal law and acknowledging its trade and commerce aspect.

The Bureau's case screening criteria may be divided into three categories: (1) economic impact factors, (2) enforcement policy factors, and (3) management factors. These factors are assessed individually and the more important ones, as I will point out, are given greater weight. The final result of the application of these case screening criteria is to provide guidance as to the priority to be given to each case for the allocation of the Bureau's resources.

## ECONOMIC IMPACT FACTORS

One of the first factors that we address is the nature and scope of the sector at issue. While the size of the sector is a consideration, we also look at its strategic importance vis-à-vis the economy as a whole. A related consideration is whether national, international or major regional participants are involved in the conduct at issue. Similarly, infrastructure industries which have important linkages to other sectors are generally of higher significance, since the effects of anticompetitive behaviour in those industries may be considerably more extensive than in other sectors.

Second, we direct our attention not only to domestic markets but also to the effect of our intervention on the international competitiveness of the firm or firms under investigation as well as that of their customers and suppliers. Our aim is to remove impediments to domestic competition so that companies may position themselves to acquire the competitive edge necessary to compete on a global basis.



Third, we carefully consider the economic impact that enforcement action is likely to have. For example, more weight will be given to those cases where the intended remedy will have an appreciable effect on economic efficiency through the promotion of competition. If, however, the market is likely to correct itself within a short period of time, or another government agency or individual private action would likely lead to corrective or remedial action, it may be more beneficial to focus our attention on other matters. Furthermore, where enforcement action on our part would support government policies or initiatives which encourage economic efficiency, such as the regulatory reforms underway in transportation and telecommunications, we would give a case greater weight in the assessment process.

#### ENFORCEMENT POLICY FACTORS

As I indicated earlier, we have decided to focus our attention on those types of anticompetitive behaviour which have the greatest potential to do harm to the Canadian economy--namely, conspiracy, bid-rigging, and abuse of dominance. Consequently, although we must consider all complaints made under the Act--and I hasten to add that we will take prompt action in any case where the circumstances and the evidence so warrant--we will be especially vigilant where one of the three types of conduct I have mentioned are involved. Where other types of conduct are concerned, however, we may often be in favour of using an alternative case resolution approach as described in the Program of Compliance bulletin.

An important consideration is whether bringing a particular case to prosecution or before the Competition Tribunal will provide important new case law. Many of the provisions of the *Competition Act* are still relatively new and have had little or no judicial interpretation. Similarly, many of the provisions carried over into the new act from the former *Combines Investigation Act* have given rise to limited, or, on occasion, to ambiguous judicial interpretation. In my view, the development of additional jurisprudence is necessary as a cornerstone to an enforcement and compliance policy in this area.

We also assign weight to matters in which our involvement will be likely to resolve an identified competition problem. Likewise, urgency will also play a role in determining the weight to be assigned to a given matter, with a higher priority accorded to those cases in which a timely intervention by the Bureau, either through prosecution or alternative means, can be expected to prevent or correct serious anticompetitive effects.

Finally, achieving compliance with the Act and enhancing deterrence require the promotion of a greater understanding of the Act and its provisions within the business community and the

public at large. Therefore, those cases that deal with pressing issues in the marketplace will be accorded more weight. The current investigation with respect to gasoline prices in several markets across Canada is a case in point.

## MANAGEMENT CONSIDERATIONS

This last category of factors relates to the internal administrative considerations, which are fundamental to our ability to simultaneously conduct a large number of inquiries efficiently. One important aspect, which I hardly need remind this audience in particular, is the cost of pursuing a case.

We try to estimate the total costs required to complete all stages of any inquiry. These costs vary considerably from case to case and can change suddenly with little warning. As you can imagine, simultaneous searches in several cities, with several officers at each location, is an expensive proposition. These costs have to be factored in, as do the costs and delays associated with the frequent Charter challenges common to all fields of law enforcement. As well, the costs of outside legal, industry and other professional expertise must be taken into account. The final factor is an assessment of the time and effort required to be in a position to take legal proceedings on a case. All things being equal, those matters which are closer to completion will be given more weight.

I should point out that, throughout this process, there is no single factor which causes the Bureau not to proceed with a case. To do so on the basis of any predetermined criteria would inappropriately fetter the exercise of enforcement discretion. However, as I stated earlier, we do consider some elements to be more important, such as the nature and scope of the sector, potential impact of the remedy, jurisprudential value, marketplace sensitivity and cost.

## CONCLUSION

One of my goals in implementing the case screening process is to avoid costly and lengthy litigation in areas where the anticompetitive activity in question is of low economic impact and the remedy's success is doubtful. The better articulation of our case screening criteria is an ongoing process which can only benefit from the considered comments of experienced corporate counsel such as yourselves. Indeed, you are well-placed to provide us with practical suggestions to improve our administration of the *Competition Act*. You are in a unique position within the business community and you have a good understanding of the markets in which your firms compete. I invite you to write to me with your comments and suggestions on the matters that I have discussed today.

I also invite you to consider the role that you can play in the effective implementation of our enforcement policies, and our desire to achieve a mutually beneficial resolution of competition concerns in an expeditious and less costly manner. It is perhaps worth noting that we have had a number of experiences during the past year with U.S. corporate counsel, acting through Canadian counsel, who, in a proactive manner, have been very instrumental in achieving positive results regarding competition in the Canadian marketplace. This is no doubt due, in part, to the historical sensitivity to anti-trust matters in the United States. However, as North America becomes more economically integrated, I am confident that Canadian counsel will also adopt a similar approach to these important marketplace matters. I look forward to hearing from you about the issues I have addressed.

Thank you.

(Version française disponible)



# Discours



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NOTES POUR UNE ALLOCUTION

PRONONCÉE PAR

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DEVANT L'ASSOCIATION INTERNATIONALE DU BARREAU,

HONG KONG, LE 1<sup>er</sup> OCTOBRE 1991





C'est avec plaisir que je profite de l'occasion pour vous parler aujourd'hui de la politique canadienne en matière de fusionnements dans une économie mondiale qui ne cesse de s'intégrer. J'aimerais d'abord vous présenter un bref aperçu de cette loi et ensuite attirer votre attention sur un nombre de développements internationaux qui influenceront certainement la politique canadienne relative aux fusionnements dans l'avenir.

## **Survол historique**

Le droit de la concurrence au Canada a connu une assez longue histoire. La première loi interdisant les coalitions qui restreignaient la concurrence a été adoptée en 1889 -- un an avant l'apparition du *Sherman Act* aux États-Unis. Les fusionnements anticoncurrentiels ont d'abord été interdits au Canada en 1910 aux termes des dispositions de la *Loi relative aux enquêtes sur les coalitions*. De 1910 à 1986, les fusionnements étaient régis par le droit criminel lorsqu'ils causaient des torts aux intérêts du public.

Les difficultés inhérentes à l'évaluation des fusionnements en termes de droit criminel sont devenues de plus en plus apparentes avec le temps. Ayant reconnu ces difficultés et ayant adopté une vision centralisée sur les conséquences économiques des fusionnements potentiellement anticoncurrentiels, le gouvernement canadien a adopté la nouvelle *Loi sur la concurrence* en 1986, abrogeant ainsi l'interdiction criminelle des fusionnements anticoncurrentiels et promulguant de nouvelles dispositions civiles à l'égard des fusionnements et des acquisitions. La nouvelle loi est clairement axée sur les conséquences économiques des fusionnements anticoncurrentiels.

## **La Loi sur la concurrence de 1986**

Les nouvelles dispositions concernant les fusionnements comptent un bon nombre d'idées provenant de ce qu'on appelle souvent le «nouvel enseignement» en économie, particulièrement dans le domaine de l'organisation industrielle. Un des premiers buts de la loi, tel que souligné à l'article décrivant l'objet de la loi, consiste à stimuler l'adaptabilité et l'efficacité de l'économie canadienne. La concurrence n'est pas protégée comme étant une fin mais plutôt pour faire la promotion d'un nombre d'objectifs variés incluant l'adaptabilité et l'efficacité.

L'importance des considérations internationales de la politique canadienne sur la concurrence est aussi mise en évidence dans la clause portant sur l'objet de la loi qui stipule que la concurrence doit être favorisée afin d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada. C'est dans l'esprit de ces objectifs que le Bureau de la politique de concurrence administre les dispositions de la loi concernant les fusionnements.

À titre de Directeur des enquêtes et recherches du Bureau de la politique de concurrence, je suis responsable de l'administration de la *Loi sur la concurrence* incluant les dispositions relatives aux fusionnements. La loi stipule que le Bureau doit examiner les fusionnements afin de déterminer s'il est possible qu'ils diminuent sensiblement la concurrence et de ce fait, entraînent une augmentation des prix, sans nuire aux gains en efficience. Si tel est le cas, je peux faire une demande d'aide corrective auprès du Tribunal de la concurrence. Je dois souligner que le Directeur n'approuve ni ne rejette les fusionnements mais plutôt décide s'ils seront contestés; en fin de compte, c'est le Tribunal de la concurrence, une entité légale indépendante, qui décide si un fusionnement contesté peut être réalisé.

### **Lignes directrices sur l'application de la loi - Fusionnements**

La politique du Bureau concernant l'examen des fusionnements a été établie dans le document *Lignes directrices pour l'application de la loi – Fusionnements*, publié en avril 1991. La communication avec le public constitue l'une des raisons d'être de l'émission de ces lignes directrices, plus particulièrement avec les communautés commerciales et juridiques qui représentent les éléments essentiels de la structure analytique que nous utilisons dans l'examen des fusionnements. Les lignes directrices ont été élaborées après un long processus de consultation auprès des secteurs publics et privés au Canada et à l'étranger.

Vous remarquerez sans doute que le concept de pouvoir de marché se trouve au coeur du processus d'examen des fusionnements. Les lignes directrices pour l'application de la loi, en voulant articuler ce concept à l'intérieur d'une structure analytique unique, offrent une base conceptuelle pour l'examen des fusionnements, même si cette base n'est pas irrévocable. Nous nous attendons à ce que les lignes directrices favorisent une meilleure compréhension du procédé d'examen des fusionnements et qu'elles dissipent les doutes pour ainsi faciliter la planification et les pratiques commerciales.

### **Application de la loi canadienne sur les fusionnements depuis 1986**

Laissez-moi maintenant vous donner un bref aperçu de notre approche en ce qui a trait aux conséquences que peut avoir un fusionnement sur la concurrence, et plus particulièrement lorsqu'il implique des éléments transnationaux. Pour déterminer si un fusionnement réduira considérablement la concurrence, nous entreprenons d'abord une étude de marché. À l'aube d'une économie mondiale, le marché en question peut très bien s'étendre à l'extérieur du Canada pour inclure d'autres pays ou d'autres régions au delà de nos frontières. Il n'est pas surprenant de constater que ce marché englobe

souvent certaines parties ou la totalité des États-Unis dans l'optique de l'intégration croissante de nos deux économies.

Il est important de noter que nous ne supposons pas automatiquement qu'il en résultera une augmentation du pouvoir de marché et une capacité d'augmenter les prix en raison de la plus forte concentration ou de la part que prendra la société fusionnée après le fusionnement. Effectivement, la loi stipule explicitement que les fusionnements ne doivent pas être interdits strictement en rapport avec les caractéristiques structurelles des sociétés, telles que leur part du marché et la concentration de celui-ci. Ce qui importe vraiment est de savoir si la concurrence sera sensiblement réduite et les prix augmentés.

Comme vous le savez, le champ d'opération des entreprises étant de plus en plus multinational, l'évaluation des conséquences d'un fusionnement sur les marchés nationaux du point de vue de la concurrence, doit se baser sur des faits comme :

- Quelle concurrence, actuelle et potentielle, provient de sociétés étrangères?
- Des substituts aux produits et services sont-ils disponibles sur le marché national ou de fournisseurs étrangers?
- Quelles sont les entraves à l'implantation sur le marché?

Évidemment, l'obtention d'une base facilitant l'évaluation de ces questions internationales peut soulever des problèmes de collecte d'information. La qualité de l'examen est directement proportionnelle à la disponibilité de l'information, qui n'est peut-être pas immédiatement accessible ou trouvable, surtout dans le cas de tierces parties étrangères.

De plus, la *Loi sur la concurrence* canadienne prévoit une disposition dérogatoire pour les cas de fusionnement anticoncurrentiel où la transaction apportera éventuellement des gains en efficience qui seront plus importants que les pertes prévues pour les consommateurs. Cela est particulièrement important dans le cas de transactions visant à rationaliser la production pour devenir plus concurrentielle dans un environnement de commerce libéralisé. Par conséquent, lorsqu'il examine une transaction de fusionnement, le Bureau, dans le cadre de sa politique d'application, voit à maximiser les avantages pour les acheteurs aussi bien que pour les vendeurs dans le contexte de l'économie canadienne.

En adoptant cette approche, le Bureau de la politique de concurrence reconnaît que la rationalisation de la production peut contribuer grandement à l'augmentation de la productivité de l'économie canadienne. Il s'agit d'un point important dans le cas d'une petite économie ouverte au commerce comme le Canada, économie qui connaît



souvent un haut niveau de concentration comparativement à ses partenaires commerciaux les plus importants.

En pratique, les transactions que le Bureau a jugé susceptibles d'éliminer ou de réduire sensiblement la concurrence, ne sont pas nombreuses. Seulement 28 des quelque 5 000 fusionnements qui ont eu lieu depuis 1986 — soit environ cinq par année — ont été jugés comme pouvant réduire sensiblement la concurrence. De ce nombre, 13 fusionnements ont été permis après l'apport de certaines modifications satisfaisant les parties et le Bureau.

### **Tendances internationales en matière de fusionnements**

Après ce bref aperçu du processus d'examen des fusionnements du Bureau de la politique de concurrence, j'aimerais aborder quelques-uns des défis auxquels nous ferons sans doute face suite aux développements économiques actuels et ce, tant à l'échelle nationale qu'internationale.

Dans le cadre d'une activité économique de plus en plus internationale, il se peut que les gouvernements nationaux questionnent davantage la politique sur les fusionnements. À cet égard, les recherches entreprises par le Bureau de la politique de concurrence indiquent que les activités de fusionnements et d'acquisitions — plus particulièrement les fusionnements qui impliquent des sociétés étrangères — continueront avec la même intensité au cours des années 90. En effet, malgré la période de repli économique de la dernière année, nos plus récentes statistiques indiquent que plus de 530 fusionnements ont été effectués au Canada durant les neuf premiers mois de 1991, dont plus de 72 pour cent impliquaient des sociétés étrangères. Par comparaison, on compte en 1990, environ 950 fusionnements dont 72 pour cent impliquaient des acquisitions par des sociétés étrangères.

On peut s'attendre à ce que la majeure partie des activités de fusionnement et d'acquisition entraînent des fusionnements horizontaux puisque les sociétés effectuent un retour à l'essentiel de leurs affaires et tentent de restructurer leurs opérations en fonction d'une concurrence mondiale grandissante. Un nombre croissant de fusionnements semblent être motivés par le désir d'acquérir des «avoirs moins solides», c'est-à-dire le personnel hautement qualifié, l'expertise administrative, les technologies spécialisées, la volonté, les marques de commerce et les droits de propriété intellectuelle de la société visée.

Afin d'assurer des résultats économiques positifs, la loi sur les fusionnements ainsi que le processus d'examen des plus importants pays industrialisés devront répondre aux élans du commerce international devenu plus libre et aux entraves



réduites aux investissements internationaux. Il est clair que la mondialisation a entraîné un nombre croissant de fusions internationales dont bon nombre vous sont familières : Gillette/Wilkinson, ABB/Westinghouse, Connaught/Institut Mérieux, Schneider/Square D et ATR/de Havilland.

Alors que les autorités internationales en matière de concurrence ont déjà une expérience des transactions impliquant de multiples juridictions, notre expérience dans le domaine a jusqu'ici soulevé d'importantes questions de coordination et de juridiction qui trouveront sans doute des réponses dans un proche avenir.

Alors que les gouvernements essaient de contrôler les habitudes des sociétés possessoriales qui souhaitent améliorer leur position sur le marché, l'analyse des fusions internationales deviendra vraisemblablement, au cours de la prochaine décennie, un sujet fondamental à l'ordre du jour des réunions sur la politique de concurrence. Une question importante qui recevra une attention considérable consiste à se demander si l'on peut prendre de meilleures décisions plus rapidement et plus économiquement grâce à une meilleure consultation et un échange d'information amélioré. Bien que dans des cas particuliers, certains pays aient eu recours à des protocoles d'entente, les dispositions sur la confidentialité de diverses lois nationales sur les fusions, sauf exceptions, ont restreint nécessairement la coopération à des questions de procédure plutôt que de substance.

Un problème qu'il faudra résoudre plus tard : les pays industrialisés font-ils une utilisation rationnelle des accords internationaux existants afin de coordonner l'application des lois antitrust internationales? Une question subsidiaire consiste à se demander si les accords actuels peuvent être élargis au profit des parties.

De très récents développements sont survenus dans ce sens la semaine dernière avec la signature d'un accord entre la Communauté européenne et les États-Unis en rapport avec l'application de leurs lois sur la concurrence. Cet accord s'ajoute aux recommandations de l'OCDE sur la coordination antitrust internationale. L'accord innove dans ce domaine en faisant plus qu'une simple déclaration forçant chaque partie à prendre en considération les intérêts de l'autre dans l'application de leurs activités antitrust; il élabore aussi quelques-uns des facteurs qui devraient être considérés dans l'intérêt de chaque pays. Par exemple, les parties se sont entendues pour se pencher sur :

- la signification relative pour les activités anticoncurrentielles impliquées, de la conduite dans chacun des territoires respectifs des parties;

- la présence ou l'absence d'un objectif, de la part des sociétés visées par les activités de mise en application, d'affecter les consommateurs, les fournisseurs ou les compétiteurs, à l'intérieur du territoire de la partie qui détient l'autorité;
- la signification relative des conséquences des activités anticoncurrentielles à l'égard des intérêts respectifs des parties;
- la proportion de conflit ou d'uniformité entre ces activités de mise en application et les lois ou politiques économiques de l'autre partie.

Il serait bon que les gouvernements examinent attentivement l'approche de la Communauté européenne et des États-Unis dans l'identification des facteurs dont il faut tenir compte lors de l'évaluation des conséquences extra-territoriales de la mise en application. De telles dispositions pourraient être particulièrement significatives pour une petite économie ouverte comme celle du Canada, où les conséquences extra-territoriales de la mise en application d'une politique antitrust étrangère peuvent être plus considérables que pour une économie plus importante.

Il est encourageant de noter que ces questions reçoivent autant d'attention de la part du secteur privé que des gouvernements. Par exemple, au cours de l'année dernière, nous avons participé aux délibérations du comité spécial sur la politique antitrust internationale de l'*American Bar Association* en vue de la préparation d'un rapport approfondi qui a été présenté au Président de la section sur la Loi antitrust de l'ABA, le 1er septembre 1991 et qui est maintenant disponible au public.

Le rapport du comité représente une contribution valable pour l'étude de ces questions complexes et je vous en recommande la lecture. Il illustre qu'il subsiste des différences considérables dans les lois sur les fusionnements des principaux pays industrialisés en ce qui concerne les questions de procédure ou de substance. Pour citer quelques exemples : la loi sur les fusionnements au Canada, en Allemagne, au Japon et aux États-Unis est appuyée principalement sur des considérations de politique de concurrence, alors que pour d'autres juridictions, l'orientation implique un mélange de politiques sur l'industrie, la concurrence et autres intérêts touchant le grand public. Le Canada est le seul pays ayant une exception légale basée sur la compensation des gains en efficience et un facteur statutaire de société à perte. Bien que le facteur de société à perte soit important dans le processus canadien d'examen des fusionnements et soit aussi reconnu dans la politique américaine sur les fusionnements, il ne semble pas faire partie de la réglementation de la Communauté européenne sur les fusionnements. De plus, la Communauté européenne et les États-Unis semblent traiter

les conséquences sur le bien-être que peuvent avoir les gains en efficience de façon différente de celle qui prévaut au Canada.

Parmi les questions soulignées par le comité spécial en matière de procédure, l'on retrouve le fardeau qui consiste à satisfaire les demandes extrêmement variées d'information et les délais des différentes autorités effectuant l'examen lorsqu'un fusionnement devient sujet à un examen par de multiples juridictions.

Ce genre de questions, qui risquent de surgir de plus en plus souvent avec le processus de mondialisation, ne peuvent être résolues que par une analyse soignée et des consultations auprès des juridictions concernées.

Dans un esprit quelque peu différent, nous devons aussi nous occuper des implications antitrust de la société commerciale «mondiale» grandissante. Les implications de cette société internationale en évolution sont un véritable défi pour les autorités à travers le monde. Quand deux sociétés internationales se fusionnent ou s'entendent sur un autre type d'accord coopératif, elles ne mettent plus ensemble que leurs avoirs réels, mais plutôt leurs idées, leur personnel et leur réseau de relations commerciales à travers le monde. En effet, leurs avoirs réels peuvent être seulement une petite partie de la transaction. Dans de telles circonstances, il est beaucoup plus difficile de se pencher sur les conséquences que la transaction aura sur la concurrence, de même qu'il est probablement moins facile pour les parties d'identifier les profits à long terme de l'opération.

Certaines inquiétudes ont été exprimées du fait que la nouvelle société internationale — avec ses directions s'insérant l'une dans l'autre, son réseau de contacts et d'alliances, sa capacité de segmenter le marché par des restrictions volontaires des exportations, ses accords de concessions et ses droits sur la propriété intellectuelle — soit souvent dans une très bonne position pour contrôler les approvisionnements et, par conséquent, les prix sur le marché mondial. Tel que noté par le comité spécial de l'ABA et d'autres dans des travaux récents, la communauté internationale antitrust peut ne pas être particulièrement bien organisée pour solutionner efficacement les problèmes de concurrence provenant de cartels, d'accords ou de fusionnements multinationaux. Nous devons donc continuellement réexaminer nos outils d'analyse, conservant ce qui est encore bon et jetant ce qui ne l'est plus; mais, nous devons au moins nous pencher sur ces questions.

Une autre question qui devra être analysée d'un point de vue antitrust, est la relation entre la société nationale «mondiale» et la tendance — partagée par plusieurs pays, incluant le Canada — de permettre à des sociétés nationales de s'unir sous la forme de co-entreprises de recherche et développement, de consortia d'exportation, de



partage de production ou d'accords de spécialisation, conçus pour leur permettre de récolter les compétences et, par conséquent, d'être plus concurrentielles sur le marché international. Ces dispositions sont souvent basées sur le principe que toute réduction de la concurrence sur le marché intérieur sera plus que compensée par une augmentation de la productivité qui à son tour profitera à l'économie nationale.

En grande partie, cela peut s'avérer véridique. Cependant, la société nationale conventionnelle, se transformant en une société «apatride» très différente, il devient moins évident de voir quelle sera l'économie nationale qui récoltera les profits de cette augmentation de productivité. En quelque sorte, nous avons affaire à un nouveau phénomène pour les organismes antitrust de même que pour les gouvernements, de façon générale, en assurant l'arbitrage approprié ou l'équilibre entre la concurrence intérieure et internationale.

Au Canada, je crois que nous sommes dans une position avantageuse pour pouvoir répondre aux élans mondiaux qui détermineront la forme de l'examen des fusionnements dans l'avenir. Les dispositions concernant les fusionnements de la *Loi sur la concurrence* de 1986, au Canada, sont bien adaptées pour faire face à l'expansion du commerce et des investissements internationaux. En effet, la politique canadienne en matière de fusionnements a déjà joué un rôle important en facilitant la restructuration de l'industrie canadienne suite au changement global et ce rôle ne peut que grandir dans l'avenir. Cependant, nous devons élargir notre compréhension dans les domaines de la politique internationale sur les fusionnements, de la société «mondiale» et des liens croissants entre la politique en matière de concurrence et les autres domaines de la politique économique.

## **Le contexte international élargi de l'analyse des fusionnements**

Les tendances que j'ai décrites peuvent aussi être placées dans le contexte plus large du rôle de la politique de concurrence à l'agenda international et les interactions croissantes entre la politique de concurrence et les autres secteurs de la politique économique. La politique de concurrence est devenue une partie intégrale des initiatives élargies de la politique industrielle de plusieurs pays.

Les liens entre la politique de concurrence et du commerce ont depuis longtemps été reconnus. En réponse à l'utilisation de cartels internationaux avant et pendant la Deuxième Guerre mondiale, la Charte de la Havane de 1947 — qui devait mener à l'établissement de l'Organisation internationale du commerce — comprenait des dispositions spécifiques à la politique de concurrence. Ces dispositions avaient pour but de prévenir les pratiques commerciales entre sociétés restreignant la concurrence, limitant l'accès au marché et favorisant le monopole dans le commerce

international. En dernière analyse, le Congrès des États-Unis s'opposa à l'Organisation internationale du commerce, la trouvant trop ambitieuse, et la communauté internationale opta pour le GATT, axé sur des barrières commerciales plus conventionnelles, imposées par les gouvernements, ignorant de ce fait le secteur des restrictions privées de l'accès au marché.

Cependant, plus récemment, à travers le travail de l'OCDE et d'autres organismes internationaux, nous avons continué à explorer les chevauchements entre les politiques de concurrence et du commerce. De même, l'importance grandissante de la politique de concurrence a été reconnue par les dirigeants du G-7 lors du Sommet économique de Toronto en juin 1988. Lors de ce sommet, le G-7 s'est impliqué par ses efforts intensifiés à promouvoir l'efficacité et l'adaptabilité de leurs économies respectives se basant sur les forces d'un marché compétitif et des réformes structurales.

Le G-7, comme les rédacteurs de la Charte de la Havane avant eux, a reconnu le rôle important de la politique de concurrence en se ralliant aux efforts de la communauté internationale pour réduire les barrières commerciales. La politique de concurrence et la libéralisation du commerce partagent des objectifs semblables. Les deux cherchent à s'assurer que les barrières artificielles soient, si possible, retirées du processus compétitif dans le but d'encourager l'efficacité de la production, la répartition des produits et services, et d'offrir aux consommateurs des prix concurrentiels et un plus vaste choix de produits. La libéralisation du commerce est axée sur des barrières créées par les gouvernements alors que le droit de la concurrence est lié à la création des barrières du procédé concurrentiel par le secteur privé. En effet, il se pourrait qu'une faible mise en application de la loi sur la concurrence soit maintenant perçue comme une pratique commerciale injuste et, par conséquent, une forme de protectionnisme en elle-même.

Étant donné l'urgence de ces questions, le temps est venu pour les créateurs de politiques de se pencher sur l'importance de la convergence et de la compatibilité entre la politique de concurrence et la loi requise pour faciliter la coordination internationale et réduire les distorsions commerciales causées par les différences antitrust.

Une harmonisation complète n'est évidemment pas réalisable. Le statut antitrust de chaque état reflète une foule de facteurs spécifiques à chaque pays, incluant son système judiciaire, l'état actuel de son développement économique, ses coutumes commerciales et son expérience antérieure de la loi antitrust et sa mise en application. Bien qu'une harmonisation complète ne soit pas possible, ou même souhaitable, une meilleure coordination entre les autorités antitrust est possible et peut même être nécessaire pour répondre aux défis qui nous attendent au cours des années 90 et plus tard.



Le Canada a proposé que ces questions et d'autres soient au centre des prochains travaux du Comité du droit et de la politique de concurrence de l'OCDE pour les deux années à venir. La proposition entraînerait, entre autres initiatives, la discussion d'un nombre de questions qui deviennent de plus en plus importantes pour la politique de concurrence dans une économie mondiale, soit :

- les objectifs de la politique de concurrence;
- les alliances stratégiques;
- la définition du marché;
- le rôle de la concurrence étrangère;
- le facteur de la société en perte;
- les liens économiques entre la politique commerciale et les autres politiques économiques.

Ceci pourrait poser les bases d'une analyse élargie de la cohérence des principes de la politique et des pratiques de mise en application dans les pays membres, et probablement la considération d'améliorations à apporter aux recommandations de 1986 sur la coopération antitrust internationale. De plus, la proposition canadienne recommande que le comité sur la loi et la politique de concurrence continue ses efforts concernant le lien entre la politique de concurrence et les autres secteurs de la politique sociale et économique. À cet égard, le plan de travail à moyen terme du Comité de l'OCDE doit être complété lors de sa réunion du mois prochain.

J'attends avec impatience nos prochaines discussions sur ces questions dans le cadre des débats et dans l'avenir. Je vous remercie.

(English version available)



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**DECISIONS AND DEVELOPMENTS:  
COMPETITION LAW AND POLICY**

REMARKS DELIVERED BY  
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TO THE CANADIAN INSTITUTE  
TORONTO, JUNE 8, 1992





## INTRODUCTION

I am pleased this morning to review with you highlights of the Bureau of Competition Policy's past year. It is a particularly opportune time, in view of the number of issues that have been decided judicially and the progress we continue to make in achieving compliance under the *Competition Act*.

My glance back over the last year reveals numerous activities, many of which I do not have the time to deal with today. Instead, I would like to focus my remarks on what I believe to be one of the most challenging aspects of our job -- ensuring clarity and certainty of our enforcement policy. There are two principal means by which this seemingly simple, but often very difficult, task is achieved; and in both the Bureau has made significant gains in the last year. First, we have received several key decisions from the Tribunal and courts. Second, the effectiveness of our enforcement policy has been enhanced through the openness and transparency achieved by the release of guidelines and our continuing pursuit of alternative case resolutions.

## IMPORTANT DECISIONS

The development of jurisprudence and the incorporation of judicial pronouncements into our policies and procedures have been a priority for the Bureau for some time. Considerable progress has been made in these areas to date. The last year has seen decisions from the Competition Tribunal and the courts in a number of important areas:

- 1) the first two fully-contested merger cases have been decided;
- 2) the Tribunal issued its decision in the second abuse of dominance case;
- 3) various constitutional issues have been advanced or decided; and
- 4) several significant criminal cases have been concluded.

### 1. Merger Decisions

The *Hillsdown* and *Southam* cases are the first two merger matters to be fully litigated before the Competition Tribunal. Perhaps as a result, both cases were plagued with procedural disputes. In *Southam* alone, there were a total of ten decisions on interlocutory matters<sup>1</sup>.

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1. Interlocutory matters dealt with include the following: *Re Southam Newspaper Group and Robson & Associates Consultants Inc.* (F.C.T.D., unreported), October 5, 1990. *Canada (D.I.R.) v. Southam Inc.* (Comp. Trib., unreported), November 11, 1990. *Southam v. Canada (Attorney General)* [1991] 2 F.C. 292 (T.D.), 35 C.P.R. (3d) 196, 49 Admin.L.R. 61 February 13, 1991. *Canada (D.I.R.) v. Southam Inc.* (1991), 36 C.P.R. (3d) 22 (Comp. Trib.), March 22, 1991. *Canada (D.I.R.) v. Southam*

One of the most important of these rulings relates to discovery. The Tribunal decided that documents obtained on discovery by the Director may not be used in proceedings for purposes other than the litigation at hand. Thus, the Director may be precluded from using information so obtained to discharge other potential investigative responsibilities under the Act. It is our view that this protection may not necessarily extend to information voluntarily and informally given at earlier stages of an examination. I believe that this restriction may impinge upon my statutory responsibilities to enforce the Act where I have reason to believe an offence has been or may be committed. The decision is, therefore, under appeal.

On the substantive issues in *Southam*, we received the Tribunal's ruling just last week.<sup>2</sup> Given its very recent release, my comments on the decision are preliminary only.

In short, the Tribunal found that there will likely be a substantial lessening of competition for real estate advertising in the North Shore of Vancouver as a result of Southam's acquisition of both the North Shore News and the Real Estate Weekly. The Tribunal has directed counsel to re-attend proceedings in order to submit evidence and argument on the appropriate remedy to address the problem, and so has not issued an Order at this time.

In respect of the major part of the application, the Tribunal concluded that Southam's acquisition of The Vancouver Courier, a community newspaper in the city of Vancouver, and the North Shore News, on the neighbouring North Shore will not likely harm competition for advertising between the Southam-owned dailies<sup>3</sup> and the community newspapers in the Vancouver area. The Tribunal was not convinced that the daily and community newspapers compete with each other for the same advertisers. It concluded that each type of paper offers a distinct set of characteristics to advertisers. As a result, it denied my application for an order seeking divestiture of these publications.

One feature of the decision which I believe is worth noting, from my initial reading, concerns the extensive analytical evidence which the Tribunal appears to require of the Director in contested merger cases. The Bureau will need to study both the scope

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Inc. (1991), 38 C.P.R. (3d) 390 (Comp. Trib.), April 29, 1991. *Southam v. Canada* (Attorney General) (1991), 36 C.P.R. (3d) 350 (F.C.A.), 49 Admin.L.R. 80, May 22, 1991. *Canada (D.I.R.) v. Southam Inc.* (1991), 38 C.P.R. (3d) 395 (Comp. Trib.), June 27, 1991. *Canada (D.I.R.) v. Southam Inc.* (1991), 37 C.P.R. (3d) 478 (Comp. Trib.), August 9, 1991. *Canada (D.I.R.) v. Southam Inc.* (Comp. Trib., unreported), August 29, 1991.

2. The Tribunal's decision in *Southam* was released on June 2, 1992.
3. Southam owns the two Vancouver-based daily newspapers: The Vancouver Sun and The Province.



and type of information which we gather during our review process, and the manner in which we gather it. For example, do we need to undertake major pricing research and other analytical studies during our merger review, which would, of course, extend the time and cost necessary to resolve difficult merger cases? I believe it would be difficult to balance such a requirement with the need for expeditious merger review.

I would like to spend a few moments discussing the Tribunal's decision in *Hillsdown* which was issued March 9, 1992. My application alleging that Hillsdown Holdings' acquisition of Ontario Rendering Company Limited (Orenco) would likely substantially lessen competition in the market for the supply of rendering material in Ontario was filed a year earlier, in February 1991.

The basis for this allegation stemmed from a number of factors. First, the merger significantly increased concentration in a highly concentrated market. Second, it was my view that foreign competitors were not likely to provide effective competition to the merged entity given the added costs of supplying the Canadian market from U.S.-based plants. What is important here was not whether the border posed an absolute barrier to the provision of rendering services, but whether it posed enough of a hindrance to allow the merged entity to raise prices materially. Third, rendering was a necessary service for which there are virtually no substitutes. Fourth, I believed entry by potential competitors was not likely to occur on a scale sufficient to ensure that a price increase could not be sustained for more than two years in view of government regulation and the costs of constructing a new plant. Fifth, prior to the merger, Orenco was a vigorous and effective competitor to Rothsay. I did not believe the remaining competition, post-merger, would be sufficient to constrain effectively an exercise in market power. Finally, we determined that only a portion of the cost savings which the parties attributed to the merger were likely to occur. That portion was not of sufficient magnitude nor likely to offset the anticompetitive effects likely to result from the merger.

Although the Tribunal agreed with many of the points raised above and so concluded that competition would be lessened as a result of the merger, it did not find that this lessening of competition would be substantial. Essentially, the difference of opinion was in regard to the supply elasticity of the "fringe"; in this case, the competitors and potential competitors to the parties post-merger. In contrast to my position, the Tribunal found that competitors held enough excess capacity to thwart a price increase of a substantial nature.

Despite the ultimate decision, the approach to merger analysis articulated by the Tribunal in *Hillsdown* does not significantly deviate from the underlying analytical process set out in the *Merger Enforcement Guidelines*. Slight differences in interpretation appear with respect to market definition and ease of entry. However, these differences may result more from differing assumptions as to what constitutes a substantial lessening of competition. The Tribunal did not offer any guidance in respect of the magnitude at which a price increase would be deemed to be substantial.

The Tribunal also considered the effectiveness of a divestiture order under the particular circumstances of the *Hillsdown* case. The Director's application was seeking an order requiring Hillsdown to divest itself of the business operated by Orenco or to divest such assets as the Tribunal may designate. In pursuing this remedy I sought to restore a competitive marketplace while being fully cognizant of the changes that were occurring within the industry -- namely, the independent decision of Rothsay to close their Toronto facility, and the likely exit of Darling from Toronto. Our objective was not to restore the pre-merger (1988) market structure but rather to place the market in the configuration it would have taken in 1992 had the merger not occurred.

No doubt, an important feature of the *Hillsdown* decision is the treatment of efficiencies. While the discussion is *obiter dictum*, it does give an indication of the Tribunal's, or at least the Chairperson's, leaning in interpretation of this section<sup>4</sup>. The Tribunal makes it clear that the onus of proving existence of the efficiencies claimed, and the likelihood of their existence, rests with the parties. In analysing the cost savings claimed by the parties, the Tribunal articulates the relevant test as "whether the efficiency gains would *likely* have been realized in the absence of the merger." This is the test employed by the *Merger Enforcement Guidelines*, despite the Tribunal's characterization of the Director's position as requiring that the cost savings arise uniquely from the merger.

More significantly, the Tribunal questions the traditional economist's use of allocative inefficiency (deadweight loss)<sup>5</sup> as the only effect of the likely substantial lessening of competition against which claimed efficiency gains are to be balanced.<sup>6</sup> While recognizing that economists generally refrain from judging in whose hands a dollar is more valuable, thereby giving a neutral weight to transfers of wealth from consumers to producers, the Tribunal appears to question whether this was the intention of the policymakers enacting the section. Rather, a more consumer-oriented approach to the section is advanced.

The Tribunal does not outline a specific legal test, but offers a series of questions for consideration in balancing efficiency gains against expected competition effects. One

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4. The Tribunal's discussion of the legal interpretation of subsection 96(1) is that of the presiding judicial member only, Madame Justice Barbara Reed. See footnote 79 of Reasons and Order.
  5. The "deadweight loss" referred to by economists is the negative resource allocation effect on the sum of producer and consumer surplus (total surplus) which results from the reduction in output (causing an increase in price) arising from an exercise of market power.
  6. Madame Justice Reed does not comment on the appropriateness of the other "losses" referred to in the Guidelines; namely, the forgone contribution to fixed costs, and pre-existing market power effects.

interpretation proposed is the weighing of efficiencies against the likelihood that detrimental effects (both the deadweight loss and the wealth transfer, or a portion thereof) will arise from the substantial lessening of competition. In sum, the larger and more likely the price effects of a merger, the less weight would be given to efficiencies. Mergers involving goods or services with inelastic demand would, therefore, face a higher efficiency "hurdle" than those with a more elastic demand, due to the greater transfer effects of an equivalent price rise. Finally, the Tribunal raises the possibility of differentiating between domestically and foreign-held firms in any trade-off analysis.

Clearly, these views diverge from the test articulated in the *Merger Enforcement Guidelines*. However, as this part of the decision is *obiter dictum*, and since the Tribunal does not explicitly endorse a new balancing test but rather offers points for consideration, there appears to be no requirement to revise the Guidelines at this time.

The section itself is broadly framed, and so, it may be argued, supports various interpretations. Economists have advocated treating the wealth transfer neutrally owing to the difficulty of assigning weights *a priori* on who is more deserving of a dollar. Even considering that some system of weighting could be articulated, the practical implications of this are likely insurmountable -- for, who is losing and who is receiving the transfer? Shares are often widely held in companies. Are the shareholders of pension-fund investors in a firm more or less deserving than the customers of that firm? Moreover, who are the customers? In cases of intermediate products, is one looking to the shareholders of the consuming companies or to their customers?

One solution to this dilemma is to adopt the U.S.-style approach to consideration of efficiencies; namely, that savings must be passed on to consumers. Yet, if Parliament's desire had been to deny the possibility of any price impact on customers by giving consideration to the wealth transfer effects of a merger, then this could also have been specified in the language of the section.

Under these circumstances, I am respectfully of the view that, from an enforcement perspective, it is preferable not to depart at this time from the approach adopted in the *Merger Enforcement Guidelines*. Moreover, it should be understood that, regardless of the interpretation, the number of cases falling into this category will not be large.

## **2. Abuse of Dominance**

This year we obtained an important decision from the Tribunal in *Laidlaw Waste Systems Ltd.*, only the second abuse of dominance case since the provision became law in 1986. Before I talk about this case, I would like to comment briefly on what abuse of dominance is and is not.

First, the law seeks to attack abuse of dominance. Dominance itself is not illegal under our law. If a firm becomes dominant because it has found a way to produce a



better mousetrap, we have no objections. Indeed, in a dynamic, innovative economy firms will often become dominant as they drive their less efficient competitors out of business in the rough and tumble of the marketplace. We do not seek to discourage efficient market behavior.

What the law does object to, however, is the abuse of dominance. Abuse of dominance can potentially mean many things. In the *Laidlaw* matter, what we saw was a large firm engaging in a variety of practices designed to create and protect a dominant market position, a dominant position based not on superior efficiency, but on a series of restrictive and exclusionary acts.

The case concerned the supply of solid waste collection and disposal services to commercial customers in three districts of Vancouver Island. Laidlaw's strategy included:

- 1) buying up all competitors in the region in a series of transactions, none of which were large enough by themselves to generate a significant lessening of competition;
- 2) maintaining the dominance gained through acquisition by signing customers to long term exclusive contracts, thus reducing beyond reasonable levels the supply of customers for any remaining competitors or potential entrants;
- 3) including meet-or-release clauses in the long-term exclusive contracts that gave Laidlaw the right to match the price of any competitor that arose, thus making it even harder to enter the market. Further, the contracts provided for the imposition of heavy financial penalties in the event a customer sought early termination;
- 4) and finally, and perhaps most importantly, engaging in "sham" litigation, that is, actual and threatened litigation without any underlying merits against those firms which did manage to gain contracts for garbage collection, thus imposing high legal fees on their competitors and sending a strong signal that they were willing to impose large costs on any future entrants.

This case builds on our previous experience in *NutraSweet* in a number of respects:

- 1) it was the first abuse of dominance case involving the services sector of the economy;
- 2) it was the first in which a series of acquisitions were challenged under the abuse provisions when the individual transactions would not in themselves give grounds for concern under the merger provisions; and

- 3) it was the first involving the use of threatened and actual litigation as an anticompetitive act.

It should be noted that the Tribunal ruled that Laidlaw's restrictive contracts constituted a barrier to entry that is contrary to public policy. Moreover, the Tribunal did not require proof of subjective intent; one can presume that it was intended that actions would have the effects which actually occurred, in the absence of convincing evidence to the contrary. From the perspective of remedies, it should also be noted that the Tribunal ordered Laidlaw, among other things, to make amendments to its customer service agreements and to refrain from enforcing those terms in existing agreements that were found to be anticompetitive.

*Laidlaw* involved a relatively small market in economic terms. I believe strongly, however, that *Laidlaw* has major implications far beyond the three communities that were directly affected. With respect to the waste disposal industry, Laidlaw has now voluntarily agreed to amend its contracts across Canada so as to remove the restrictive elements which the Tribunal found to be objectionable. I believe that Laidlaw's voluntary extension of the reach of the order is responsible. It is an example to the other major participants in this industry of a self-generated pro-competitive initiative. With respect to enforcement policy, the *Laidlaw* decision is significant. Exclusionary and restrictive clauses are a frequent occurrence in certain industries' contracts. Where these clauses serve individual companies only in protecting their dominant positions by creating barriers to entry, the Director will seek enforcement action.

### 3. Constitutional Challenges

This year we received important decisions on constitutional challenges to the *Competition Act* and the Competition Tribunal. Two cases remain outstanding in the Supreme Court of Canada -- a leave to appeal application in the *Couture* case and a judgement on the merits in the *Pharmacy Association of Nova Scotia (PANS)* case.

As you may know, the majority decision of the Supreme Court of Canada in the case of *R. v. Wholesale Travel Group Inc.*, released in October 1991, dealt with the constitutionality of section 60(2) of the Act in the context of a prosecution under section 52(1)(a) for misleading advertising. Section 60(2) required accused persons who had published a false or misleading advertisement to take timely corrective measures in order to successfully avail themselves of the defence of due diligence.

The Supreme Court of Canada upheld the onus on the accused to establish that, in its advertising, it exercised due diligence and took reasonable precautions to avoid a misleading effect. In the broader context, this decision upheld the constitutionality of strict liability offences -- of which, it is estimated, there were 97,000 in 1983 -- and which place a similar burden to demonstrate due diligence on accused parties. The decision avoided significantly raising the burden of proof on the Crown in such prosecutions, which would have been the case had the Ontario Court of Appeal decision not been



reversed. However, the timely retraction prerequisite to make use of the due diligence defence was unanimously held to be unconstitutional and therefore no longer remains in effect.

From an enforcement policy perspective, this decision means two things. First, parties who make representations to the public which come within the scope of the misleading advertising and deceptive marketing practices provisions of the Act should examine whether their actions can withstand the kind of scrutiny enunciated in this case by the majority of the Supreme Court. Parties who may wish to avail themselves of the defence of due diligence must demonstrate that they took reasonable care to avoid a misleading effect. Examples of behaviour that might satisfy this requirement include a formal policy of executive review of advertising materials which entails reasonable follow-up to ensure their accuracy and making timely corrections, where inaccuracies are found.

Second, although placing a timely corrective notice is no longer a statutory prerequisite to availing oneself of the due diligence defence, it is our policy nevertheless that it may influence our decision regarding the enforcement remedy that will be sought in respect of a valid complaint. The publication of a corrective notice would be a positive consideration in the exercise of our enforcement discretion. I should note that our experience is that businesses often take corrective action as a matter of course. Once an error is discovered, it is simply good business practice to take corrective measures to avoid alienating customers.

The challenge to the merger involving Sanimal Industries Inc. and Alex Couture Inc. Holdings, as well as other companies, began in June 1987. Couture then submitted its constitutional challenge to the Quebec Superior Court. The Superior Court earlier declared that the Competition Tribunal, as well as provisions of the *Competition Act* with respect to mergers, were unconstitutional.

This decision was overturned in September 1991 by the Quebec Court of Appeal. The constitutionality of the Tribunal and the provisions of the *Act* with respect to mergers were confirmed. While we have a strong affirmation of constitutionality on this front, Couture has requested leave to appeal to the Supreme Court of Canada. As of this date, the Supreme Court is still considering the leave application.

With respect to the decision in *PANS*, the Nova Scotia Court of Appeal last spring upheld section 45, the conspiracy provision of the Act. This seems to have created a more favourable enforcement climate. Following the decision, the Bureau has seen a renewed willingness by parties to advance discussion regarding section 45 cases. For the time being, the difficulties of the previous year have been placed behind us as no new challenges have been initiated. We expect the Supreme Court of Canada decision very soon. We hope it will settle the intent and vagueness arguments that have been advanced in recent years with respect to the conspiracy provisions.

While not a constitutional matter, I should also mention the most recent developments in the *Chrysler* case. It is one of only two refusal to deal cases brought before the Competition Tribunal. Chrysler had actively encouraged Brunet, an automotive parts supplier in Montreal, to develop market opportunities. However, once markets developed, Chrysler Canada was directed by Chrysler U.S. to cut off the supply of automobile parts to Brunet. In October of 1989, the Tribunal issued an order forcing Chrysler Canada to resume supply to R. Brunet Company, its only export account.

We later sought from the Tribunal a contempt order against Chrysler for not following the terms of its order to re-supply Brunet. Chrysler appealed both the Tribunal's decision on the merits and the jurisdiction of the Tribunal to grant the contempt order. The Federal Court found in the Director's favour on the substantive issues, and Chrysler's leave to appeal application to the Supreme Court was dismissed earlier this year. Chrysler's appeal on the contempt issue, however, was successful with the Federal Court of Appeal ruling that the power to punish for contempt committed outside the presence of the Tribunal was not clearly conferred on the Tribunal under the *Competition Tribunal Act*. Our appeal from this decision was heard by the Supreme Court in January 1992. No decision has yet been rendered, though clearly, it will be one of considerable significance for the Bureau.

#### 4. Criminal Cases

The vigorous enforcement of the conspiracy and bid-rigging provisions of the *Act* remained a high Bureau priority with continuing emphasis on increased penalties and charges against individuals, where appropriate, to increase deterrence. The Bureau's resolve to use these tools was demonstrated in its inquiry into the compressed gas industry which, through guilty pleas in the fall of 1991, resulted in record fines of greater than \$6 million being levied under the conspiracy provisions against the five major suppliers in Canada. It is also significant that charges were laid against two senior executives of one of the companies, who were assessed record fines of \$75,000 each.

The largest fine ever imposed on an individual under the *Competition Act* was also obtained this year. Donald Cormie, President of the Principal Group, was convicted of one count under the general misleading advertising provisions for his "Chairman's Message" in the Principal Group's 1985 Annual Report. Investors had relied on his representation of the firm's move out of real estate before the market had collapsed. The Alberta Court of Queen's Bench imposed a fine of \$500,000.

In summary, in the last year we have seen significant progress in three areas:

1. **the development of Tribunal jurisprudence** -- this will guide our internal procedures as well as business activities;

2. **the resolution of some constitutional challenges** -- although Supreme Court of Canada judgements on *Couture* and *PANS* are outstanding, the constitutional threats appear to have receded somewhat; and
3. **the setting of sentencing precedents in criminal matters** -- the high level of fines in cases shows a willingness by the courts to impose significant penalties on corporations and individuals for serious violations of the *Competition Act*.

These developments have resulted in a greater measure of certainty in a number of areas and it has, we hope, created a climate of stronger deterrence in respect of potential contraventions.

## **AN EFFECTIVE ENFORCEMENT POLICY**

The second major area I wish to comment on today is our enforcement policy. As alluded to earlier, this encompasses a number of elements:

- 1) promoting education on the law in a proactive way -- through speaking engagements and the issuance of enforcement guidelines;
- 2) ensuring compliance with the Act -- through legal actions which I have already discussed, and also through what I have termed alternative case resolutions.

### **1. Enforcement Guidelines**

Enforcement guidelines form the heart of the educational side of our Program of Compliance. They are an indispensable tool to building a sound understanding of the *Competition Act* among the legal profession, the business community and the general public. They also ensure internal consistency in the application of the Act. The Bureau has made extensive progress in its goal of building a solid program of information dissemination to the public. We strongly believe that an appreciation of how the Bureau will enforce the Act promotes compliance, prevents violations and avoids costly litigation. The Compliance Branch within the Bureau of Competition Policy has become a vital part of our enforcement operations.

Of course, guidelines cannot be a binding statement of how discretion will be exercised in all situations because the specific standards set out in any set of guidelines must be applied to a broad range of possible factual circumstances. Guidance regarding specific situations may therefore be requested from the Bureau through its Program of Advisory Opinions. The Bureau will apply the standards of its enforcement guidelines reasonably and flexibly to the particular facts and circumstances of such situations.

Enforcement guidelines are also not intended to bind or affect in any way the discretion of the Attorney General in the prosecution of matters under the Act. Nor are



they intended to be a substitute for the advice of legal counsel. Final interpretation of the law is the responsibility of the courts and Competition Tribunal.

We now have more than a year's experience with the *Merger Enforcement Guidelines*. All indications point to their widespread use and application. For the Bureau, they represent a formal and precise expression of directing principles and procedures that had been used internally. They have promoted rigorous and consistent assessments. For the business community, we believe that a better understanding of our enforcement policy has resulted. We know that it has improved the submissions we receive from parties to mergers. These submissions now deal more incisively with information that is relevant to speedy and thorough assessments. A great deal of the success of the *Merger Enforcement Guidelines* is due, I believe, to the responsive and open consultations we had with the business and legal communities prior to publication.

This year has also witnessed revision of the *Misleading Advertising Guidelines*. Our updated version of the *Misleading Advertising Guidelines* was published to meet the business community's expressed need for concise and accessible guidelines to assist them in interpreting and applying those provisions. The publication has been well-received, evidenced in part by its wide circulation and continual requests for copies.

In addition to these publications, we have successfully expanded the range of our guidelines to encompass two more major provisions of the Act. Our year-long process of consultation has yielded the *Predatory Pricing Enforcement Guidelines*, just recently published and will shortly yield the *Price Discrimination Enforcement Guidelines*.

Section 50(1)(c) of the Act reflects the view of Parliament that certain unfair pricing practices should not be used to diminish competition and its benefits by creating the criminal offence of predatory pricing. However, there is a fine line between predatory pricing and vigorous, but healthy price competition, and little jurisprudence to guide the business community. The guidelines seek to make clear the Director's enforcement policy in this area to remove any chilling effect that the existence of the provision may have on vigorous price competition.

The guidelines draw on enforcement experience and developments in economics to produce an analytical framework which helps to identify pricing behaviour which is truly harmful to competition, as distinct from that which does not require corrective action. Rather than focussing initially on whether the alleged predator's prices are below costs, emphasis is placed on the likelihood of the firm being able to recoup its losses in a later period. This involves an analysis of market power, the ability of the alleged predator to profitably maintain prices above the level that would prevail in competitive conditions.

The enforcement guidelines on predatory pricing will allow the Bureau to do its work more effectively, in a less intrusive fashion, and, at the same time, guide business

on the great deal of freedom that exists under the law to engage in vigorous price competition.

Similarly, the *Price Discrimination Enforcement Guidelines* will point to the legitimate scope which exists, within section 50(1)(a), for the adoption of innovative pricing practices and strategies. These guidelines, which we expect to release shortly, are the result of difficult but informative and useful consultations.

Compared to predatory pricing, there is virtually no case law to guide the business community with respect to the limits of the fair treatment to purchasers. The complex wording of the section, and the variety of interpretation which can be given to its elements, may lead to misunderstandings. It was determined that this state of affairs fell short of providing the certitude both business and the Bureau need to ensure compliance with the Act.

Since the *Price Discrimination Enforcement Guidelines* are not yet published I would like to give you an overview of some key areas where we consulted heavily and where changes were made to the draft guidelines distributed in January 1992.

The guidelines will continue the approach to the term "available" identified earlier, which promotes a great deal of flexibility in granting price concessions to competing purchasers. In addition, the guidelines will set out the approach to the treatment of buying groups, franchise organizations and the granting of international volume price concessions.

On **availability**, there will be no change concerning the basic premise that conditional discounts are permissible provided they are "available" as described in the statute. However, we have spent considerable time and effort in clarifying the respective obligations of sellers and purchasers as to the degree of disclosure that will satisfy the Director that a discount is available. The extent to which a price concession should be disclosed to competing purchasers in order for the Director to consider it "available" varies depending on the circumstances. If the seller unilaterally decides to offer a price concession, such as a volume rebate, it should be communicated to competing purchasers of like quality and quantity. By contrast, such broad disclosure is not required if the seller grants a price concession only as a result of negotiations initiated by a purchaser who agrees to provide a service in exchange for the concession. Here, for the concession to be considered "available" it need only be communicated to those competing purchasers who ask for similar concessions on similar terms as the favoured purchaser. The seller is not obliged to extend such a concession to a purchaser who simply asks for the seller's "best deal", as a matter of form.

A second key area where there has been a significant change since the draft guidelines were published is in the area of defining the **"purchaser"** for the purposes of the price discrimination provisions. We have been persuaded that the section need not be applied in a manner that penalizes some forms of business structures or some types of



transactions over others, where such business structures or transactions are legitimate. Whether an issue regarding group volume discounts is raised under the section usually depends on who is the true "purchaser" of articles in a given transaction. This question often arises in the context of buying groups, franchise operations and international corporate buying arrangements. In determining which party is the "purchaser", the Director is prepared to review all the circumstances of a transaction. The true purchaser in any transaction will normally be the firm that has made the necessary contractual commitment to acquire the goods sold.

For buying groups, this will generally be satisfied if the group assumes liability for the articles purchased. For franchise systems and international volume price concessions, the franchisor or multinational parent company would satisfy this requirement by committing their franchisees or international subsidiaries respectively to purchase from the seller granting the concession.

These approaches to determining the "purchaser" would seem to be in accord with the marketplace as it currently functions and we believe are less intrusive than previous interpretations under the price discrimination provisions.

In summary, we have endeavoured to produce a set of price discrimination guidelines that will permit sellers to design and implement price inducements and other innovative marketing incentives without risking an unknowing violation of criminal law. Sellers must still treat competing purchasers equitably, but the theory driving these guidelines is that the market should determine the relative acceptability and efficacy of these concessions unless the law clearly prohibits them.

## 2. Alternative Case Resolutions

An effective enforcement policy requires that, in light of current resource constraints, we look beyond the traditional means of criminal prosecution and formal proceedings before the Tribunal for resolutions. We must look not only at the punitive but at the remedial aspects of final resolution, which can include prohibition orders, undertakings and other corrective action. A primary concern is to correct anticompetitive practices in the marketplace, and if this can be done more effectively and efficiently through alternative means, we will entertain proposals to resolve matters short of litigation. Rarely, however, will this approach be acceptable for serious criminal offences like sections 45 and 47, where a court penalty may be important for deterrence.

Orders of prohibition and undertakings are two typical alternative means of resolving cases short of litigation. While orders of prohibition vary greatly in content, depending on the practice in question, undertakings in misleading advertising often contain common terms, including:

- ♦ an undertaking to publish, within thirty days of the signature of the undertaking, a corrective notice

- ♦ an undertaking to inform in writing all of the party's dealers, sales representatives, sales employees, etc. of the contents of the undertaking within thirty days of its signature.

Consider a recent misleading advertising example which was resolved through an order of prohibition under section 34(2) of the Act and undertakings in lieu of prosecution. The example is **Air Canada**. In promoting its frequent flyer plan, Air Canada represented in its "Aeroplan Travel Rewards Chart" that the award category "JA2" provided three free economy class tickets with the redemption of 60,000 "aeromiles." Investigation revealed that restrictions were placed on members ability to redeem "aeromiles" for tickets under the "JA2" category in a manner which was inconsistent with the general impression conveyed by the chart. In one case, a member would have required the unnecessary expenditure of 10,000 "aeromiles" in order to receive the three free economy class tickets represented in the award category "JA2".

Air Canada undertook to reimburse all eligible customers who had suffered losses in redeeming their "aeromiles" by providing them with "aeromile" credits, in addition to the usual terms. In this case, the alternative resolution saved the time and cost of prosecution and may even have provided for a better resolution from the consumer's perspective, 56 of whom received reimbursement.

To summarize, the past year has been one of considerable progress. It can be characterized as a year of notable resolution and clarification. We have had several significant decisions from the Tribunal. We have seen some uncertainty related to constitutional challenges to the Act reduced -- this has increased our ability to enforce the Act. And, we eagerly await decisions of the Supreme Court in the remaining constitutional challenges. We have witnessed record fines imposed for criminal breaches of the Act. Internally, the Bureau has clarified its enforcement policies in respect of misleading advertising and predatory pricing through release of revised or new guidelines. Price discrimination guidelines are almost completed. And we continue on various fronts to expand our efforts in achieving compliance with the Act through various means.

## FUTURE INITIATIVES

This brings me to what initiatives we plan to tackle in the future. Much of what we have accomplished will be further built upon. Key decisions in *Couture* and *PANS* are expected this year. Constitutional challenges have also impressed upon us the need to revise a number of our enforcement practices in light of the Charter and to review our information gathering procedures in light of recent court cases. And we will continue to sharpen our criteria for case selection to ensure that we bring the right cases forward.

On the criminal side, price-fixing and bid-rigging cases will remain Bureau priorities. Our work in the area of misleading advertising will continue to focus on

national cases or regional cases involving high-priority issues such as telemarketing and environmental claims. In all of these matters, we will continue to seek substantial fines and recommend to the Attorney General that charges be laid against individuals where the evidence so warrants, in order to maximize deterrence.

In the area of enforcement policy generally, we have several initiatives planned, in some of which work has already commenced. A proactive public education program will continue. We will continue our efforts to explain the role of the Act and our enforcement of it to government and business through speaking engagements. Our contributions to the Government's economic policy agenda, in particular prosperity and competitiveness, have revealed a few misconceptions about the Act which we will continue to address.

I also anticipate developing a more comprehensive approach to the Bureau's exercise of discretion regarding recommendations for immunity, sanctions, and other related issues. For instance, it may be time for the Bureau to assess how it enforces the statute against price maintenance given the vigor of the economic debate which surrounds this issue.

I would like to add a few words about our recent work, in cooperation with the Attorney General's office, on the subject of witness immunity in matters involving the *Competition Act*.

I first commented on this topic during my presentation to the Canadian Corporate Counsel Association in Calgary on August 19, 1991. At that time I indicated that we had begun to develop a policy aimed at providing greater incentives for corporations and individuals to voluntarily report their participation in conspiracy and bid-rigging activities **before** they came to our attention. This initiative is just one aspect of our more general efforts aimed at ensuring effective, fair and timely resolution of investigations arising under the Act.

We have, since last August, held lengthy consultations with the Attorney General's office and experienced members of the private competition bar in order to examine the many complex issues and concerns which the related issues of plea negotiations, sentencing and immunity give rise to. We have also had the benefit of the Canadian Law Reform Commission's thorough and thoughtful report on "Immunity From Prosecution" which was issued earlier this year. These consultations have allowed us to clarify many of the issues that must be addressed in order to ensure that the possibility of a grant of immunity by the Attorney General continues to be a useful and effective tool to promote compliance with the *Competition Act* consistent with the fair and impartial administration of justice.

In general, I believe remedies will be an area of increasing Bureau attention this coming year. We need to have a well-developed policy that encompasses advisory opinions, undertakings, criminal convictions and Tribunal orders, including consent



orders and injunctive relief. Further thinking must be done on the type and magnitude of penalties on the criminal side. The courts, as I have noted, are responding well, but clearly further work is needed if deterrence is to be enhanced. On the civil side, we must fully analyze both the legal and economic implications of the remedies sought.

Too often enforcement agencies complete only half a job. We cannot stop at identifying and prosecuting the anticompetitive activity. We must also seek relief which will enable competition at the level at which it would have been without the anticompetitive act. It is important to note here that one must anticipate the course of events which the industry may be competitively advancing towards, such as was the case in *Hillsdown*, as I have already mentioned.

The means of achieving relief is as important as the end itself. By choosing procedures which, in themselves, may not have a pro-competitive impact, the desired outcome will not be achieved. Although relief must be remedial rather than punitive, except in criminal matters, of course, it must be effective notwithstanding any necessary hardship upon the parties. In this regard, I believe greater use needs to be made of the various tools at our disposal under the Act in both civil and criminal matters. Section 11 discovery and hearings as well as injunctive relief are obvious examples. Furthermore, the consent order process has been subject to much commentary. I believe we must work towards reinstating the use of consent orders in merger cases as well as commence their use in other civil matters such as abuse and vertical restraints cases.

In conclusion, the Bureau must ensure that the remedies we adopt are effective and enforceable if we are to achieve our goal of improving the public's understanding of how the Bureau seeks to promote competition in the Canadian marketplace.

Thank you.

(Version française disponible)



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## **Developments and Emerging Challenges in Canadian Competition Law**

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**October 22, 1992**

**New York, New York**





In the past twelve months in Canada, we have witnessed a number of key judicial decisions under the *Competition Act*, including three in the Supreme Court of Canada.<sup>1</sup> Indeed, the developments of the past year have been a watershed in the evolution of Canadian competition law. They signal a re-affirmation by the courts of the important role of competition policy to Canada's economic prosperity, thus further contributing to the trend that began with the passage of the new *Competition Act*<sup>2</sup> in 1986.

The 1986 Act is, in my view, a modern and flexible law that is well adapted to the challenges of antitrust enforcement in a global economy. It did not spring into being in a vacuum, however. While it draws heavily from the experience of other jurisdictions and contemporary economic theory in the field of industrial organization, it also reflects Canada's particular economic, legal and institutional framework.

Canada's system of public law has historically given considerable prominence to the role of constitutional law in determining the validity and application of economic legislation as between federal and provincial governments. The impact of constitutional issues has considerably increased since the passage of the *Canadian Charter of Rights and Freedoms*<sup>3</sup> in 1982, four years before the *Competition Act*.

Accordingly, one of the major challenges for antitrust enforcement in recent years has been to withstand the numerous Charter challenges to various aspects of the law, both substantive and procedural. While a number of trial decisions have hindered our progress in advancing several important cases, the courts in the past year have signalled their endorsement of the policy underlying several key provisions of the *Competition Act*. The courts have considerably reduced the uncertainty regarding the enforceability of these key provisions of the Act.

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1. *R. v. Nova Scotia Pharmaceutical Society*, S.C.C., July 9, 1992 (unreported); *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Canada (Competition Tribunal) v. Chrysler Canada Ltd.*, S.C.C., June 25, 1992 (unreported).
  2. R.S.C. 1985, c. C-34, as amended.
  3. *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, as enacted by *Canada Act, 1982* (U.K.), 1982, c. 11.

This presentation will first review a number of these landmark decisions from the perspective of our enforcement policy. I will conclude by discussing a few emerging issues, both domestic and international, that we have recently begun to address and that will command greater attention in coming years.

## I. RECENT DEVELOPMENTS

In discussing recent judicial developments, I am especially pleased with the contrast between what I have to say to you today and the remarks contained in my last paper at this conference in 1990.<sup>4</sup> Those of you who were in attendance may recall that at that time I reported that lower courts had struck down, on constitutional grounds, both the price-fixing and merger provisions of the *Competition Act* as well as the Competition Tribunal in its entirety.

A brief summary of the issues that have recently been decided by the courts will, I think, provide an indication of the significance of these recent developments:

- ◆ the constitutionality of the price-fixing provisions of the Act has been unequivocally upheld by a unanimous judgement of the Supreme Court of Canada.<sup>5</sup> In this decision, the Supreme Court, for the first time, provided a comprehensive analytical framework for the interpretation of Canada's price-fixing laws;
- ◆ the Supreme Court upheld the power of the Competition Tribunal to enforce its decisions through contempt orders;<sup>6</sup>

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4. Howard I. Wetston, "Merger Law in Canada" (1990), *Fordham Corporate Law Institute: International Mergers and Joint Ventures*, 287.

5. *R. v. Nova Scotia Pharmaceutical Society*, *supra*, note 1.

6. *Competition Tribunal v. Chrysler Canada Ltd.*, *supra*, note 1.

- ◆ the Supreme Court upheld the constitutionality of the misleading advertising provisions of the Act;<sup>7</sup>
- ◆ the Supreme Court denied leave to appeal from a unanimous appellate court decision affirming the constitutionality of the merger provisions of the Act as well as that of the Competition Tribunal;<sup>8</sup>
- ◆ the Competition Tribunal recently issued decisions in the first two fully-contested merger cases<sup>9</sup> under the 1986 *Competition Act* as well as its second abuse of dominance decision;<sup>10</sup> and
- ◆ the courts imposed record fines against both individuals and firms in price-fixing cases,<sup>11</sup> as well as a record individual fine under the Act in a misleading representation case.<sup>12</sup>

The recent case law, together with the release of enforcement guidelines concerning mergers (April 1991), price discrimination (September 1992), predatory pricing (May 1992) and misleading advertising (September 1991), have considerably

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7. *R. v. Wholesale Travel Group Inc.*, *supra*, note 1.

8. *Canada (A.G.) v. Alex Couture Inc.* (1991), 83 D.L.R. (4th) 577 (Que. C.A.); leave to appeal to S.C.C. denied, July 2, 1992.

9. *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*, C.T., March 13, 1992 (unreported); *Director of Investigation and Research v. Southam Inc.*, C.T. June 2, 1992 (unreported).

10. *Director of Investigation and Research v. Laidlaw Waste Systems Inc.* C.T., February 11, 1992. (unreported)

11. September 6, 1991, Union Carbide Canada Ltd. and Canadian Oxygen Ltd. pleaded guilty to conspiring to fix the price of compressed gas sold or supplied in liquid bulk form and were fined \$1.7 million and \$700,000 respectively. On September 13, 1991, Canadian Liquid Air Ltd. and Liquid Carbonic Inc. also pleaded guilty to similar charges and were fined \$1.7 million each. On October 18, 1991, two individuals associated with Liquid Carbonic Inc. pleaded guilty to conspiracy charges and were each fined \$75,000. Air Products Canada Ltd. pleaded guilty to conspiracy charges on October 25, 1991 and was fined \$200,000. Two further individuals pleaded guilty to conspiracy charges in July 1992 and were fined \$75 000 and \$50 000, respectively.

12. On January 22, 1992, Mr. Donald Cormie was convicted under the misleading advertising and deceptive marketing practices provisions of the *Competition Act*, and was fined \$500,000.



advanced the important objectives of providing guidance to the business and legal communities with respect to the enforcement of Canada's competition law. Enforcement guidelines, in particular, have become an important tool in the Bureau of Competition Policy's efforts towards articulating and clarifying its enforcement policies and practices.

In the time allotted to me I will attempt to address a few of the key decisions that I believe have important implications for antitrust enforcement in Canada.

## 1. Criminal Enforcement

### (i) Conspiracy

Of particular significance is the recent *Pharmaceutical Association of Nova Scotia*<sup>13</sup> (PANS) decision where the Supreme Court not only dismissed a challenge to the constitutional validity of the conspiracy provisions of the Act but also outlined the analytical framework for the application of that section. The case arose from charges that were laid in 1987 against a number of pharmacists -- firms and individuals -- as well as their professional associations alleging, *inter alia*, that the accused fixed dispensing fees charged to private insurance companies in Nova Scotia. In a pre-trial motion, the accused obtained an order quashing the indictment.

The Nova Scotia Supreme Court held that the conspiracy provision of the *Competition Act* was too vague to withstand constitutional scrutiny on account of the imprecise standard required to establish that the alleged agreement would prevent or lessen competition "unduly".<sup>14</sup> The Court also found the section to be unconstitutional since it does not require that full subjective intent be established by the Crown with respect to the accused's intention to lessen competition unduly. On appeal, the Nova Scotia Court of Appeal reversed the decision, finding that the section was not void for vagueness. The Court of Appeal, however, also interpreted the

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13. *Supra*, note 1.

14. *R. v. Nova Scotia Pharmaceutical Society* (1990), 98 N.S.R. (2d) 296.



section as requiring proof of subjective intent as to both the intention to enter into the agreement and the intention to lessen competition unduly.<sup>15</sup>

The issues before the Supreme Court of Canada were essentially constitutional in nature. However, in deciding the vagueness question, the Court had to clarify the meaning of "undueness". It further addressed the "undueness" issue in dealing with the question of the constitutionally required intent. Indeed, the Court noted in its unanimous decision, that it had not previously had the opportunity to consider the process whereby the undueness of a restriction on competition is assessed.

To understand the full significance of the PANS decision, it is necessary to review some of the jurisprudential history of the Canadian conspiracy provision. Unlike section 1 of the *Sherman Act*, section 45 of the *Competition Act* and its predecessors are not framed as a general prohibition against agreements in restraint of competition. Rather, section 45 contains an express qualifier requiring the prosecution to establish that an alleged agreement would prevent or lessen competition "unduly". Thus, the Court expressed the view that section 45 expressly precludes the development of a category of *per se* offences such as those which have been articulated by U.S. courts since the passage of the *Sherman Act*.

Until the late 1970's, however, Canadian courts generally interpreted the provision in a manner which recognized the intent of the drafters that "the preventing or lessening of competition is in itself an injury to the public".<sup>16</sup> Prior to 1977, it appeared well settled under Canadian jurisprudence that (1) the Crown was not required to prove any public detriment beyond the lessening of competition past the specified threshold, that is, "unduly"; (2) that it was no defence for the accused to argue that the intended or actual results of the agreement were otherwise beneficial to the public; and (3) that the Crown had to establish that the accused intended to enter into the agreement which, if implemented, would prevent or lessen competition unduly,

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15. *R. v. Nova Scotia Pharmaceutical Society* (1991), 102 N.S.R. (2d) 222.

16. *Howard Smith Paper Mills Ltd. et al. v. The Queen*, [1957] S.C.R. 403, per Kellock J. at 411.

without being required to establish that the accused intended the agreement would have such effect.

The initial doubts about the foregoing propositions first appeared in the Supreme Court's 1977 decision in *Aetna Insurance Co. v. The Queen*,<sup>17</sup> which involved alleged price fixing by approximately 70 percent of the fire insurance companies in the province of Nova Scotia through their industry association. In that case, the majority of the Court upheld the trial judge's decision to admit evidence as to the positive public benefits resulting from the association's activities, ostensibly on the basis that the evidence was "relevant in [the trial judge's] search for the design and plan of the agreement."<sup>18</sup> Having done so, the majority created some uncertainty as to whether this evidence was admissible on the question of undue influence or intent.

Yet a further source of uncertainty arose in connection with the degree to which competition had to be prevented or lessened in order to be characterized as "undue". The source of this ambiguity was a minority judgment in *Howard Smith Paper Mills Ltd. v. The Queen*,<sup>19</sup> a 1957 decision of the Supreme Court of Canada, where Mr. Justice Cartwright stated that "an agreement to prevent or lessen competition ... becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by competition ..."<sup>20</sup> The ambiguity created by this statement had apparently been resolved by a 1976 amendment to the conspiracy section which clearly states that it is not necessary to establish that an agreement would have the effect of eliminating competition, completely or virtually.

Against this background, the PANS case assumes greater significance beyond the fact that the Court upheld the constitutionality of the provision. With respect to the interpretation of "unduly", the Supreme Court adopted as a starting point the view that

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17. *R. v. Aetna Insurance Co. et al.*, [1978] 1 S.C.R. 731.

18. *Id.*, per Ritchie J. at 751.

19. *Supra*, note 16.

20. *Id.*, at 426.

"unduly" expresses a notion of seriousness or significance. More importantly, however, the Supreme Court's decision appears to herald a more modern economic orientation to the interpretation of section 45. Indeed, the Court prefaced its analysis of the provision by an express recognition that the *Competition Act* is a central feature of Canadian public policy in the economic sector.<sup>21</sup>

The Court then proceeded to elaborate its view with respect to the major elements of the examination mandated by section 45, that is, "(1) the structure of the market and (2) the behaviour of the parties to the agreement."<sup>22</sup> With respect to market structure, the court clearly emphasized that the main objective is to determine the degree of market power enjoyed by the parties to the agreement.<sup>23</sup> Market share, while a relevant factor, is not determinative and must be considered in the context of a host of other relevant economic factors.<sup>24</sup> In this regard, while the Court relies on existing Canadian jurisprudence in describing the nature of this assessment, it also clarifies the economic focus of the examination.

A similar focus on economic aspects of the behavioural element of the offence is also evident in the Court's decision. However, it is with respect to the interaction between these two elements that the Court's decision presents the greatest opportunities for the enforcement of section 45. As the Court indicates, it is the combination of the two elements -- market power and behaviour -- that makes a lessening of competition undue. The Court noted that:

"Many combinations are possible. For one, market power may come from the agreement . . . Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious. A

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21. *R. v. Nova Scotia Pharmaceutical Society*, *supra*, note 1, at 44.

22. *Id.*, at 49.

23. *Id.*, at 51.

24. *Id.*



particularly injurious behaviour may also trigger liability even if market power is not so considerable."<sup>25</sup>

Indeed, the fact that antitrust economic analysis should inform section 45 enforcement decisions is further illustrated by the Court's reference to its standard as lying part-way on a continuum between a *per se* standard at one end and a full "rule of reason" standard at the other, as these concepts are understood in U.S. antitrust law. The Court characterized the section as creating a partial rule of reason; "partial" only, because it mandates an inquiry into the seriousness of the competitive effects of the agreement while precluding "a full-blown discussion of the economic advantages and disadvantages of the agreement."<sup>26</sup>

Furthermore, the Court clearly endorsed the traditional Canadian position with respect to the public policy underlying the conspiracy provision as being grounded on the premise that "the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other stand-point."<sup>27</sup> Indeed, after noting section 1 of the *Sherman Act* and article 85 of the *Treaty of Rome*, the Court stated that the conspiracy provision of the *Competition Act* "is not just another regulatory provision. It definitely rests on a substratum of values. . ." to the effect that competition is presumed to be in the public benefit.<sup>28</sup>

With respect to the requisite intent, the Court concluded that section 45 required the proof of subjective intent of the accused with respect to the entering into the agreement and of objective intent with respect to lessening competition unduly. In other words, the Crown must "demonstrate that the proof, viewed objectively (i.e. by a reasonable business person), establishes that the accused was aware or ought to have been aware that the effect of the agreement ... would be to prevent or lessen

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25. *Id.*, at 56.

26. *Id.*, at 48.

27. *Supra*, note 16.

28. *R. v. Nova Scotia Pharmaceutical Society*, *supra*, note 1, at 46.

competition unduly."<sup>29</sup> It is significant that the standard set by the Crown was that of a reasonable business person "who can be presumed to be familiar with the business in which he or she engages."<sup>30</sup>

As a result of the Supreme Court's decision, the PANS case is now going to trial and other prosecutions in which the accused had raised similar constitutional issues will now proceed through the courts in due course.

In the context of the internationalization of competition law, the PANS decision portends additional significance. The Supreme Court of Canada devoted considerable attention to a comparative analysis of the legal provisions relating to horizontal restraints of trade in Canada, the U.S. and the European Community. Of particular interest was the Court's unhesitating use of foreign law, particularly section 1 of the *Sherman Act*, to characterize the nature of the anti-competitive restraint under Canadian law.

As you know, considerable attention is being paid to the role of competition law in an international economy. Closer to home, the application of our respective competition laws will come under increasing scrutiny, particularly as the Canadian and U.S. economies become increasingly integrated under successive free trade agreements. Decisions such as PANS may inspire discussion regarding whether the substantive laws in relation to horizontal restraints of trade, for example, are converging somewhat in the absence of legislative reform.

The convergence issue may take on even greater significance in light of chapter 15 of the NAFTA which reflects the Parties' commitment toward maintaining -- and in Mexico's case, adopting -- effective antitrust laws, as well as a commitment to cooperate in antitrust enforcement activities.

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29. *Id.*, at 61.

30. *Id.* at 60.



The impact of the PANS decision on enforcement policy must also be considered in the context of the tight resource constraints under which the criminal law provisions have operated in recent years. As a result of these constraints, emphasis has been placed on developing case screening criteria to select those cases with the greatest impact.<sup>31</sup> Similarly, in recent times emphasis has been placed on high deterrence enforcement techniques, such as targetting individuals and the development of an immunity policy.<sup>32</sup>

The analytical framework developed in the PANS decision supports and legitimizes to a great extent the screening criteria already in place. Conspiracy under the Canadian law has never been a *per se* offence, but it may now be possible to identify types of collusive behaviour that may be contrary to section 45 even if market power is not so considerable. In these situations we may be able to make greater use of alternative case resolution instruments, such as consent prohibition orders, which correct borderline behaviour, but save the cost of litigation.

I should add that, despite the uncertainty surrounding the interpretation of the conspiracy section prior to the Supreme Court's decision, the Bureau of Competition Policy continued to vigorously enforce that provision. A measure of the success that we have experienced during the past year in this regard is the *Compressed Gas*<sup>33</sup> case which, through guilty pleas in the fall of 1991 resulted in record fines in excess of \$6 million being levied under the conspiracy provision against the five major suppliers of compressed gas in Canada. It is also significant that the Courts have levied record individual fines of \$75,000 against three executives and \$50,000 against a fourth in that same case. These precedents are consistent with the Bureau's policy of seeking increased penalties and, where appropriate, charges against individuals in order to increase deterrence.

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31. Criteria grouped under three headings, 1) Economic Analysis, 2) Enforcement Policy and, 3) Management Considerations, are used to assist in deciding to which cases resources should be allocated. See Howard I. Wetston speech to Cdn Corp. Counsel Assoc., Calgary, Aug. 19, 1991.

32. *Id.*

33. *Supra*, note 11.

(ii) Misleading Advertising

Canada's *Competition Act* includes criminal provisions relating to restrictive trade practices as well as provisions concerning fair trade. In this regard, another important recent decision of the Supreme Court of Canada in the case of *R. v. Wholesale Travel Group Inc.*<sup>34</sup> dealt with the constitutionality of section 60(2) of the *Competition Act* in the context of a prosecution for misleading advertising. Section 60(2) required accused persons who had published a false or misleading advertisement to take timely corrective measures in order to successfully avail themselves of the defence of due diligence.

The Court upheld the onus on the accused to establish that it exercised due diligence and took reasonable precautions to avoid a misleading effect. The decision avoided significantly raising the burden of proof on the Crown in such prosecutions, which would have been the case had the Ontario Court of Appeal decision not been reversed. However, the timely retraction prerequisite to make use of the due diligence defence was unanimously held to be unconstitutional and therefore no longer remains in effect.

I should also mention that the largest fine ever levied against an individual under the *Competition Act* was obtained pursuant to the misleading advertising provision this year in the *Cormie*<sup>35</sup> case. The accused, the President of the Principal Group, was convicted for making misleading representations, on which a large number of investors had relied, to the effect that the firm had moved out of real estate before the market had collapsed. The court imposed a record fine against an individual under the Act in the amount of \$500,000. This case is also significant in that the representations in question were made in the Principal Group's annual report, thus acknowledging that the misleading advertising provision is not limited to representations made in more conventional advertising contexts alone.

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34. *Supra*, note 1.

35. *Supra*, note 12.

## 2. Civil Enforcement

In addition to criminal enforcement, the *Competition Act* also addresses a number of important anti-competitive practices through civil provisions adjudicated by the Competition Tribunal. During the past year, we have obtained several important decisions in relation to abuse of dominance, mergers, and the Tribunal's powers to enforce its orders.

### (i) Abuse of Dominance

In the *Laidlaw*<sup>36</sup> case, we initiated proceedings before the Competition Tribunal under the abuse of dominance provisions of the *Competition Act*. The application sought relief with respect to conduct designed to create and protect a dominant market position.

Among the practices of the respondent firm that we asked the Tribunal to address were the following:

- ◆ acquiring competitors in the relevant market in a series of transactions, none of which were large enough by themselves to generate a significant lessening of competition;
- ◆ entering a market by acquiring the sole competitor and then excluding that competitor through restrictive covenants;
- ◆ maintaining the dominance gained through acquisition by signing customers to long term exclusive contracts, thus reducing beyond reasonable levels the supply of customers for any remaining competitors or potential entrants;
- ◆ including right-to-compete clauses in the long-term exclusive contracts that gave Laidlaw the right to match the price of any competitor that arose, or

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36. *Supra*, note 10.



any provision requiring the customer to take Laidlaw's offer, thus making it even harder to enter the market;

- ◆ and finally, engaging in "sham" litigation, that is, actual and threatened litigation without any reasonable underlying merits against those firms which did manage to gain contracts for garbage collection, thus imposing high transaction costs on its competitors and sending a strong signal that they were willing to impose large costs on any future entrants.

The Tribunal upheld the Director's application and issued an order requiring Laidlaw, among other things, to make amendments to its customer service agreements and to refrain from enforcing those terms in existing agreements that were found to be anticompetitive.

This case builds on our previous experience under the abuse of dominance provisions<sup>37</sup> in a number of respects:

- ◆ it was the first abuse of dominance case involving the services sector of the economy;
- ◆ it was the first in which a series of acquisitions were challenged under the abuse provisions when the individual transactions would not in themselves give grounds for concern under the merger provisions; and
- ◆ it was the first involving the use of threatened and actual litigation as an anticompetitive act.

The Bureau of Competition Policy has been successful in both abuse of dominance cases brought before the Tribunal in recent years. The abuse of dominance provisions of the Act are a key element of the framework for control of anti-competitive practices in the *Competition Act*. The assessment of unilateral monopolistic practices is a complex and challenging task. Practices which are harmful to competition in a particular context can be pro-competitive or competitively neutral in other market circumstances. Much of what the Bureau accomplishes in protecting

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37. *Director of Investigation and Research v. Nutrasweet Company* (1990), 32 C.P.R. (3d) 1 (C.T.).

markets against anticompetitive practices is obtained through deterrence. Favourable Tribunal decisions clearly enhance deterrence.

(ii) **Merger Review**

Earlier this year, the Competition Tribunal issued two important merger decisions. The *Hillsdown*<sup>38</sup> and *Southam*<sup>39</sup> cases were the first two merger applications to be fully litigated before the Tribunal.

The first decision, *Hillsdown*, was issued March 9, 1992. The Tribunal dismissed an application alleging that Hillsdown Holdings' acquisition of Ontario Rendering Company Limited (Orenco) would likely substantially lessen competition in the market for the supply of rendering material in Ontario.

The application challenging the merger was based primarily on the following factors:

- ◆ the merger significantly increased concentration in a highly concentrated market;
- ◆ foreign competitors were not likely, in our view, to provide effective competition to the merged entity in that the Canada/U.S. border, while not creating an absolute barrier, posed enough of a hindrance to allow the merged entity to raise prices materially;
- ◆ rendering was a necessary service for which there are virtually no substitutes;
- ◆ entry by potential competitors was not likely to occur, in our view, on a scale sufficient to ensure that a price increase could not be sustained for more than two years in view of government regulation and the costs of constructing a new plant;

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38. *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*, C.T., March 13, 1992 (unreported).

39. *Director of Investigation and Research v. Southam Inc.*, C.T. June 2, 1992 (unreported).



- ◆ the acquired firm, Orenco, was a vigorous and effective competitor prior to the merger;
- ◆ only a portion of the efficiency gains claimed by the parties were likely to occur, and that portion was of insufficient magnitude to offset the anticompetitive effects likely to result from the merger.

The Tribunal agreed with many of the points raised above and so concluded that competition would be lessened as a result of the merger. In the final analysis, however, the Tribunal felt that this was a border-line case and did not find that this lessening of competition would be substantial. Essentially, the difference of opinion was in regard to the supply elasticity of the "fringe"; in this case, the competitors and potential competitors to the parties post-merger. (Interestingly, these fringe competitors were located in bordering U.S. states.) In contrast to our position, the Tribunal found that competitors held enough excess capacity to thwart a price increase of a substantial nature.

Despite the ultimate decision, the approach to merger analysis articulated by the Tribunal in *Hillsdown* did not significantly deviate from that elaborated in the 1991 Merger Enforcement Guidelines. There are differences in point of detail regarding, for example, market definition and ease of entry, that may be due to differing assumptions as to what constitutes a substantial lessening of competition. The Tribunal did not, however, offer any guidance in respect of the magnitude at which a price increase would be deemed to be substantial.

The *Hillsdown* decision's treatment of efficiencies has, however, generated considerable attention. While the discussion of efficiencies is *obiter dictum* in this case, it gives an indication of the Tribunal's, or at least the Chairperson's, leaning in interpretation of this section. The Tribunal questions the use of allocative inefficiency (deadweight loss) as the only effect of the likely substantial lessening of competition against which claimed efficiency gains are to be balanced.

The Tribunal does not outline a specific legal test, but offers a series of questions for consideration in balancing efficiency gains against expected competition

effects. One interpretation proposed is the weighing of efficiencies against the likelihood that detrimental effects (both the deadweight loss and the wealth transfer, or a portion thereof) will arise from the substantial lessening of competition. In sum, the larger and more likely the price effects of a merger, the less weight would be given to efficiencies. The Tribunal also raises the possibility of differentiating between domestically and foreign-held firms in any trade-off analysis.

The efficiency section itself is broadly framed, and so, it may be argued, supports various interpretations. Economists have advocated treating the wealth transfer effects of mergers neutrally owing to the difficulty of assigning weights *a priori* on who is more deserving of a dollar. Even considering that some system of weighting could be articulated, the practical implications of this are likely insurmountable -- for, who is losing and who is receiving the transfer?

One solution to this dilemma is to adopt the U.S.-style approach to consideration of efficiencies; namely, that savings must be passed on to consumers. Yet, if Parliament's desire had been to deny the possibility of any price impact on customers by giving consideration to the wealth transfer effects of a merger, then this presumably would have been specified in the language of the section.

Under these circumstances, and given that the Tribunal does not explicitly endorse a new balancing test, I am respectfully of the view that, from an enforcement perspective, it is preferable not to depart at this time from the approach adopted in the Merger Enforcement Guidelines. Moreover, it should be understood that, regardless of the interpretation, the number of cases falling into this category is not large.

The second merger case, *Southam*, involved an application before the Competition Tribunal with respect to Southam's acquisition of several community newspapers in the Vancouver area. Southam is a major Canadian newspaper publisher that owns both daily newspapers in the Vancouver region. The application alleged that the acquisition would likely substantially lessen competition in the markets for print advertising in the Vancouver region and for real estate advertising on the Vancouver North Shore.

The Tribunal dismissed the application with respect to the print advertising market, but found that there would likely be a substantial lessening of competition for real estate advertising in the relevant market.

In respect of that part of the application which dealt with print advertising, the Tribunal was not convinced that the daily and community newspapers compete with each other for the same advertisers. It concluded that each type of paper offers a distinct set of characteristics to advertisers. As a result, the application for an order seeking divestiture of these publications was denied. This decision is presently under appeal before the Federal Court of Appeal.

In essence, the grounds of appeal address the following concerns regarding the decision's impact on merger review:

1. the approach to market definition, particularly where product differentiation and dynamic market considerations are an issue;
2. the burden of proof on the Director, particularly in merger matters before the Competition Tribunal; and
3. the respective roles of economic theory versus industry facts in formulating views regarding market definition and anti-competitive intent.

In my view, bringing sound merger cases is essential to an effective competition policy. Despite these two adverse merger decisions, the Bureau of Competition Policy will not fundamentally alter its approach to the enforcement of the merger provisions of the Act. It is important to recall that due to our merger enforcement policy some potentially anti-competitive mergers are not even attempted. If they are, we are often able to achieve a resolution that involves a restructuring of the transaction in a manner that reduces our concerns regarding competition in the Canadian marketplace.



(iii) The Competition Tribunal's Contempt Power

Another significant decision of the Supreme Court was the *Chrysler*<sup>40</sup> refusal to deal case. In October of 1989, the Competition Tribunal issued an order requiring Chrysler Canada to resume supplying Brunet, an automotive parts supplier, who was its only export account. We later initiated contempt proceedings before the Tribunal against Chrysler for not following the terms of its order to re-supply Brunet. Chrysler appealed both the Tribunal's decision on the merits and the jurisdiction of the Tribunal to grant the contempt order. The Federal Court of Appeal found in the Director's favour on the substantive issues,<sup>41</sup> and Chrysler's leave to appeal application to the Supreme Court was dismissed earlier this year.<sup>42</sup>

With respect to the contempt issue, Chrysler's appeal to the Federal Court of Appeal was successful.<sup>43</sup> The case was appealed to the Supreme Court of Canada. In a majority judgment issued in July of 1992, the Supreme Court affirmed the Competition Tribunal's jurisdiction to enforce its orders through contempt proceedings.<sup>44</sup> Thus, the Tribunal can continue to bring its specialized expertise to bear in ensuring that its orders are respected without having to invoke judicial proceedings before another forum.

### 3. Conclusion

As I indicated at the outset, the developments of the past year amount to a strong judicial endorsement of the basic premises underlying the *Competition Act* and its central role in Canada's economic policy. This endorsement will be of great assistance to the Bureau of Competition Policy in the enforcement of the Act. It will

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40. *Canada (Competition Tribunal) v. Chrysler Canada Ltd.*, S.C.C., June 25, 1992 (unreported).

41. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1991), 129 N.R. 77 (F.C.A.).

42. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* S.C.C., April 9, 1992 (unreported).

43. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1990), 2 F.C. 565 (C.A.).

44. *Supra*, note 40.

ensure that the Canadian consumers and producers will continue to benefit from a vigorous and competitive economy.

## II. EMERGING CHALLENGES

Antitrust practitioners can rest assured that new enforcement issues are continually arising. For example, during the past year we have increasingly turned our enforcement attention to the issue of joint dominance.

### 1. Joint Dominance

Joint dominance is a broad concept that encompasses a range of practices through which a group of firms in an industry can exercise market power collectively. Such conduct may occur without an explicit agreement and often falls short of behaviour that violates antitrust conspiracy provisions. It may include the operation of common facilities in ways that exclude potential entrants from a market, the joint use of vertical restraints to entrench the market position of incumbent firms and strategic entry deterrence through signalling behaviour. In view of the high levels of concentration in many Canadian industries, the potential abuse of market power by jointly dominant firms takes on a particular significance.

Antitrust authorities have not always been successful in their attempts to address such conduct. In considering the application of Canadian competition law to such conduct, it is helpful to reflect on the FTC's experience in the 1984 *Ethyl* case, which dealt with consciously parallel but independent signalling behaviour designed to stabilize prices in the market for anti-knock gasoline compounds.<sup>45</sup> In that case, the Commission chose not to appeal a decision of the Court of Appeal for the Second Circuit which reversed the Commission's prior ruling that four manufacturers of such compounds had engaged in unfair methods of competition under section 5 of the FTC Act. I note that, more recently, the Commission appears to be dusting off section 5, and is applying it to various practices that are not otherwise explicitly covered by the

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45. *E.I. Dupont de Nemours and Co. v. FTC* 1984-1 Trade Cas. (CCH) 65,881 (2d Cir. 1984).



U.S. antitrust laws,<sup>46</sup> although it remains to be seen how far the Commission will go in applying the section to joint dominance situations.

In Canada, joint conduct that lessens competition substantially may be addressed under the abuse of dominance provision, section 79 of the *Competition Act*. Paragraph 79(1)(a) of the Act refers explicitly to situations in which "one or more persons" substantially or completely control, throughout Canada or an area thereof, a class or species of business. Previous judicial interpretation of similar wording in the old *Combines Investigation Act*<sup>47</sup> suggests that the present section 79 is applicable to situations whereby "one or more persons, inclusive of independent corporations, through the coordination of their activities work together as a unit."<sup>48</sup> It should be noted that the mere existence of dominance in an industry -- whether involving one or more firms -- is not actionable under section 79. Rather, it must also be shown that the firm(s) involved have engaged in a practice of anti-competitive acts that have had the effect of lessening competition substantially.

To date, the cases dealt with by the Competition Tribunal under section 79 have dealt with exclusionary practices by individual firms rather than joint dominance situations. Currently, however, members of my staff are examining some matters that involve the potential application of section 79 to joint dominance. These include the operation of common facilities in ways that exclude potential entrants from a market and concerted use of vertical restraints to entrench the dominance of incumbent firms. These are some of the most complex matters that have been looked into by the Bureau of Competition Policy during my tenure of office. In such matters, arguments are often put forward that the practices involved are justifiable for efficiency-related purposes, such as lower transaction costs or prevention of free-riding. These issues require careful consideration, to ensure that competition policy deals effectively with anti-competitive practices without interfering with arrangements that facilitate beneficial innovation or otherwise enhance the efficiency of marketplace transactions.

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46. "FTC Broadens Antitrust Use of an Old Law," *Wall Street Journal*, September 30, 1992, p. B1.

47. R.S.C. 1970, c. C-23, as amended.

48. *R. v. Canadian General Electric et al.* (1976), 15 O.R. (2d) 360.

Thus, the area of joint dominance is likely to be one of the most challenging ones for antitrust authorities and private practitioners in the 1990s.

## 2. International Challenges

I would like to conclude with a Canadian perspective on some of the challenges facing competition policy enforcement internationally. The influence of international factors has become increasingly pervasive in our enforcement work. For example, mergers and acquisitions in Canada frequently involve foreign purchasers or sellers.

While globalization and trade liberalization affect us all, their impact is felt particularly strongly in a small and open economy like ours. By way of illustration, we may compare the degree of foreign participation in Canadian merger activity with that in the United States. According to a recent article by James Rill, former Assistant Attorney General, 22 percent of the 1500 Hart-Scott-Rodino reported transactions during the first nine months of 1991 involved foreign nations.<sup>49</sup> By contrast, of the 500 mergers that came to the attention of the Canadian Bureau of Competition Policy during the first eight months of 1991, whether by pre-notification or otherwise, 73 percent involved foreign acquisitions.

Against this background, the reduction of trade barriers pursuant to successive GATT rounds, the Canada-U.S. FTA -- and soon NAFTA -- has provoked substantial structural adjustment in the Canadian economy as firms adapt to increasingly international -- even global -- markets. In consequence, trade liberalization has brought about an increased sensitivity to international considerations in our administration of Canada's *Competition Act*.

As a result of the increasing pace of globalization, the international antitrust community faces a number of important challenges in the immediate future. These challenges are not restricted to merger control but relate to other aspects of enforcement work as well.

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49. James F. Rill and Virginia R. Metallo, "Globalization of Competition: the case for convergence", *International Merger Law*, August 1992.

First, we must ensure that we have the tools in place to successfully address anti-competitive behaviour on a global scale. Second, we must improve on the existing mechanisms to minimize the frictions that arise when antitrust enforcement in one jurisdiction has an impact on the economic interests of another. Third, it has become clear during the past year that we can -- and should -- do considerably more to ensure that the divergent merger review processes in different jurisdictions do not result in excessive transaction costs or otherwise deter pro-competitive transactions.

Existing arrangements such as the OECD Recommendation, the Memorandum of Understanding between Canada and the U.S., the recent U.S./EC Agreement and other similar instruments, represent a good starting point. The chapter on competition policy in the just completed NAFTA accord is in a similar vein. However, it will be important to find new avenues for cooperation to minimize the frictions that arise as a result of antitrust enforcement involving foreign elements or significant overlap between agencies, as well as to remedy anti-competitive behaviour on an international scale. For example, the recent Mutual Legal Assistance Treaty (MLAT) between Canada and the U.S. provides a stronger set of powers to investigate conspiracies and other anti-competitive conduct under our criminal laws. This Treaty allows each country to invoke the compulsory processes of the other to effectively prosecute criminal violations of our antitrust laws. Similarly, recent amendments to the Canada - U.S. Extradition Treaty now allow either country to seek extradition of individuals charged criminally under price-fixing and other conspiracies. While I am not at liberty to discuss particular cases at this time, I can say that we have invoked the provisions of the MLAT in two investigations thus far and I am confident that the results will be significant.

A major hurdle to increased international cooperation in antitrust enforcement today, however, is the restriction on information sharing between competition authorities imposed by the various national competition laws. For example, Canada's *Competition Act* prohibits the disclosure of information obtained by the Director pursuant to the use of formal investigatory powers except for the purpose of the administration or enforcement of the Act. Disclosure of information obtained from merging parties during the course of a merger review is similarly prohibited. The



prohibition prevents even disclosure to other Canadian government agencies, let alone foreign government agencies.

While some discussion between competition authorities is possible to the extent that it can be limited to information that is publicly available about a particular industry or firm, we are unable to pursue discussions at a more detailed enforcement level.

Having said this, I do not mean to question the rationale for the existence of strong confidentiality provisions. The protection of commercially sensitive information pertaining to private parties is absolutely essential to the preservation of both the integrity and the effectiveness of a competition policy regime. This is nowhere truer than in connection with mergers and acquisitions. One easily appreciates the legitimate concerns that would be provoked by the prospect that such information might be disclosed without the consent of the firms involved.

However, it is important not to leave the topic of information sharing without noting that governments can and do share sensitive information in a number of domains as a matter of course. There are also precedents for the sharing of private commercial information between governments. We must therefore be careful not to magnify the obstacles in the way of effective international cooperation in a way that prevents us from seriously examining the available options. One preliminary step might be to establish a mechanism allowing merging parties to consent to information sharing among reviewing agencies internationally. While information sharing under such circumstances would only be likely when it is advantageous to the merging parties, it will nevertheless provide competition authorities with much-needed experience in the area of cooperative merger review.

## CONCLUSION

The challenges and constraints facing competition authorities in the international domain are evident. I believe that the major industrialized countries should be prepared to test the existing arrangements for international cooperation to their limits while pursuing more comprehensive mechanisms to attain common objectives.

However, we should also face the possibility that our current arrangements could be inadequate in the face of the potentially global reach of anti-competitive conduct. The international community may need to explore additional vehicles, including the incorporation of competition policy provisions into multilateral trade agreements. We have begun this process in chapter 15 of the NAFTA.

On the domestic front, the developments of the past twelve months that I reviewed at the outset have already had a important beneficial impact on antitrust enforcement in Canada. I believe that the Bureau's policies and approach are well suited to the challenges facing the Canadian economy in the future. Our reliance on economic analysis to inform enforcement decisions will continue to guide us in uncovering and remedying anti-competitive conduct in Canada.

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